TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~568~~ 2

LOVANDER LADNER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1956
CERTIORARI GRANTED NOVEMBER 13, 1956

Supreme Court of the United States

OCTOBER TERM, 1956

No. 568

LOVANDER LADNER, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

[fol. A] IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAPTION—(Omitted in printing)

[fol. 2] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

INDICTMENT—Filed June 13, 1944

The Grand Jurors of the United States of America, duly and legally elected, empaneled, sworn and charged, at the Term aforesaid, of the Court aforesaid, to inquire in and for the Southern District of Mississippi, upon their oaths present that LOVANDER LADNER, and RAMSEY PATRICK CAMERON, alias "Ramsey Ladner", whose full and true names, other than as herein stated, are to the Grand Jurors unknown, and hereinafter referred to as the Defendants, on or about the 22nd day of May, 1944, in the Southern Division of the Southern District of Mississippi, and within the jurisdiction of said Court, did then and there knowingly, wilfully, unlawfully and feloniously, ... conspire, combine, confederate and agree together, and with one another, and each with the other, to commit an offense against the United States of America, to wit: unlawfully, wilfully, knowingly and feloniously to violate the provisions of Section 254, Title 18 of the United States Code, that is [fol. 3] to say, they so conspired, confederated, combined and agreed together, and each with the other, to wilfully and by means and use of deadly and dangerous weapons, to commit an assault on acting commissioned officers of the United States, to wit, Federal Investigators and Agents of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the performance of their official duties, and while such officers were then and there engaged in the performance of their official duties and were then and there transporting prisoners who were then and there under arrest and in the custody of said officers and were being transported by said officials from the scene of the

prisoners' arrest to the County Jail in Gulfport, Mississippi, and the said defendants at the time they so conspired, confederated, combined and agreed together, as aforesaid, knew such officers to be acting and commissioned officers of the United States, as aforesaid.

And the Grand Jurors aforesaid do further present that after having wilfully conspired, combined and confederated as aforesaid, and subsequent to the formation of said conspiracy, and during the existence thereof, certain of said persons, at the several times and places hereinafter mentioned in connection with their respective names, did do certain overt acts in furtherance thereof and to effect and accomplish the purpose and object of said unlawful conspiracy as follows, to-wit:

[fol. 4] *Overt Acts*

1. Lovander Ladner, on or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, ran from an illicit whiskey distillery to avoid being arrested by the officers, as aforesaid, and went to the home of Lawrence Ladner and reported the incident.

2. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, Lovander Ladner engaged in a conversation with the defendant Ramsey Patrick Cameron at the home of Lawrence Ladner soon after the arrival of Lovander Ladner who had fled from the illicit whiskey distillery.

3. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendant, Ramsey Patrick Cameron, had a private conversation with Wilton Ladner, and immediately following the conversation, Wilton Ladner rode away on horseback in the direction of his home.

4. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendants, Ramsey Patrick Cameron and Lovander Ladner, rode off together from a group of men and went in the direction of Ramsey Patrick Cameron's house where they left their horses and soon there-

[fol. 5] after were seen walking in the direction of and near the scene of the assault upon the officers, and the defendant, Lovander Ladner, was carrying a shotgun in his hand.

5. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendant Ramsey Patrick Cameron was seen to contact Wilton Ladner who had returned from his mission on horseback, and this meeting occurred very near the scene of the assault upon the officers.

6. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendants Lovander Ladner and Ramsey Patrick Cameron went to the scene where the assault was committed upon the officers, were there a few minutes before the assault and at the time of the assault upon the officers.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do say that the said defendants, continuously during the period of time, at the places and in the manner and form aforesaid, wilfully and feloniously did conspire to commit and offense against the United States, and certain of said defendants did do and perform acts to effect the object of said conspiracy, in violation of Section 88, Title 18, United States Code, ...
..... contrary to [fol. 6] the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count

And the Grand Jurors aforesaid, at the Term aforesaid, of the Court aforesaid, upon their oaths aforesaid, do further present that the defendants, Lovander Ladner and Ramsey Patrick Cameron, alias "Ramsey Ladner", on or about the 22nd day of May, 1944, in the Southern Division of the Southern District of Mississippi, and within the jurisdiction of this Court, did then and there knowingly wilfully, unlawfully and feloniously, ...
..... by means and

use of deadly and dangerous weapons, to wit: loaded shotguns, a more particular description of said shotguns being to the Grand Jurors unknown, forcibly assault James Buford Reed who was then and there a duly appointed acting and commissioned officer of the United States, to wit: a Federal Investigator and Agent of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the performance of his official duties, and while he, the said James Buford Reed was then and there engaged in the performance of his official duties, in that the said James Buford Reed, acting as aforesaid, then and there jointly with W. W. Frost, another such Agent and Officer, had [fol. 7] under lawful arrest and in their custody, Elmer Ladner, Alphone Saucier and Paverine Saucier, and were transporting them from the scene of their arrest to the County Jail in Gulfport, Mississippi, and the said defendants, with the deadly and dangerous weapons aforesaid, shot and seriously wounded the said James Buford Reed, and the said defendants then and there well knew the said James Buford Reed to be such officer of the United States, in violation of Section 254, Title 18, United States Code, ... contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count

And the Grand Jurors aforesaid, at the Term aforesaid, of the Court aforesaid, upon their oaths aforesaid, do further present that the defendants, Lovander Ladner and Ramsey Patrick Cameron, alias "Ramsey Ladner", on or about the 22nd day of May, 1944, in the Southern Division of the Southern District of Mississippi, and within the jurisdiction of this Court, did then and there knowingly, wilfully, unlawfully and feloniously ..... by means and use of deadly and dangerous weapons, to wit: loaded shotguns, a more particular description of said shotguns being to the Grand Jurors unknown, forcibly assault W. W. [fol. 8] Frost who was then and there a duly appointed

acting and commissioned officer of the United States, to wit: a Federal Investigator and Agent of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the performance of his official duties, and while he the said W. W. Frost was then and there engaged in the performance of his official duties, in that the said W. W. Frost, acting as aforesaid, then and there jointly with James Buford Reed, another such Agent and Officer, had under lawful arrest and in their custody, Elmer Ladner, Alphonse Saucier and Paverine Saucier, and were transporting them from the scene of their arrest to the County Jail in Gulfport, Mississippi, and the said defendants, with the deadly and dangerous weapons aforesaid, shot and wounded said W. W. Frost, and the said defendants then and there well knew the said W. W. Frost to be such officer of the United States, in violation of Section 254, Title 18, United States Code, ... contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(S.) Toxey Hall, United States Attorney.

A True Bill:

(S.) J. F. Boardman, Foreman of the Grand Jury.

[fol. 9] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

EXHIBIT 1

Statement of Ares J. Hoda

Kiln, Mississippi

made May 24, 1944, in room two Meadow Building, Gulfport, Mississippi in the presence of:

Clyde D. Pace, Special Investigator, Alcohol Tax Unit.
Edgar C. Fortenberry, Special Agent, F. B. I.

Ed L. Blue, Special Agent, F. B. I.
Cecil D. Meeks, Investigator in Charge, Alcohol Tax Unit.

My name is Ares J. Hoda; I am married and live on my own place about three quarters of a mile east of Hocky Hill Church, in Hancock County, Mississippi, I have lived there in that community all of my life.

On Monday, May 22, 1944, I went up to Ramsey Cameron's house; I got there around eight o'clock in the morning, soon after I got to Ramsey's house Harvey Malley got there. Ramsey, Harvey and me then went over in the woods to Pen Sheep. After we had been in the woods for a little while we ran across Lawrence Ladner, Chester Ladner, Avin Saucier and Leverne Neciase who were also penning sheep. We all drove the sheep up to Lawrence Ladnier's house and put them in the pen [fol. 10] there at his house. We stayed there until after dinner. I remember that around dinner time Lovander Ladner walked up to Lawrence Ladner's house. I recall that I saw Lovander Ladner and Ramsey Cameron standing off talking to each other several times, but I did not hear their conversation and don't know what they were talking about. I was sure that the officers were out there and that something had happened, but I did not know what it was. After we got the sheep separated at around 2:00 or 2:30 o'clock, we took some of them to Ramsey Cameron's house. I remember that Ramsey Cameron, Leverne Necaise, Lawrence Ladner, Wilton Ladner, Lavander Ladner, Harvey Malley and me left Lawrence Ladner's house with the sheep. When we got up near Elmer Ladner's house I saw Ramsey Cameron and Wilton Ladner drop back behind the rest of us; they stood there and talked for a little bit and then Wilton rode off through the woods and toward his house. After Wilton left us, Ramsey Cameron and Lovander Ladner rode on ahead of us and toward Ramsey's house. I did not know what they were up to, but I was suspicious of them and me and Harvey Malley talked to Lawrence Ladner about it, I asked Lawrence to talk to Ramsey and Lovander and find out what they were up to; I told him that

I was afraid that they were fixing to get into trouble and that maybe he could stop them. Lawrence Ladner, Harvey Malley, Leverne Necaise and me drove the sheep on to Ramsey's house; when we got up there in the road [fol. 11] and *and* about 200 yards from Ramsey's house I saw Ramsey Cameron and Lovander Ladner coming from toward the house; they had crossed the road and were over in the woods and I noticed that Lovander Ladner was carrying a shot-gun in his hand. At that time Lawrence Ladner left us and walked out and met them and stopped there and talked to them. I did not hear what Lawrence said to Ramsey and Lovendar, but he told us later that he tried to get them to come on back to the house and stay out of trouble.

After Lawrence started on back toward us, I saw Lovander walk on across the woods and toward the place where I later learned that the officer was shot. I saw Ramsey walk on down the road a little ways where he met Wilton Ladner. Wilton was still on his horse and I could not see what he had, if anything, but I did see him stop and talk with Ramsey. Wilton then rode on up to the house and helped Lawrence, Harvey, Leverne and me to put the sheep in the pen.

After we had got the sheep in the pen, Harvey and me talked with Lawrence Ladner about what Lovander and Ramsey were up to and Lawrence said that he tried to get them to come on back and to stay out of trouble, but that they would not listen to him. Harvey and me then got on our horses and rode off up the hill and north and a little east of Ramsey's house. Just as we left the [fol. 12] house I saw Leverne Necaise leave and ride off in the direction of his home. He lives up the road and toward Rocky Hill Church from Ramsey's house. We left Lawrence Ladner and his wife there at Ramsey's house with Wilton Ladner and Ramsey's wife and children; they were all out in the barn yard milking. After we got up in the woods, around a half mile from the house, Wilton Ladner caught up with us. At that time we were still in sight of Ramsey's house and could see that Lawrence Ladner was still there at the barn. I recall that soon after Harvey and me rode away from Ramsey's

house that I could see Lovander Ladner and Ramsey Cameron standing down there in the bushes, just off the road to the west side of the road and at the place where Mr. Reed was shot. I could not see if they had guns or not, but could see them standing there and I knew in my own mind that they were there for no good purpose.

We rode on up in the woods a short distance after Wilton Ladner caught-up with us and I heard five shots. The shots were fired at the place where I saw Ramsey Cameron and Lovander Ladner standing and just a few minutes after I saw them standing there. We stopped and looked back, but I was unable to see anything, I did hear a motor of a car racing and in a little-bit saw a cloud of dust comming up from the road and it looked to me like that it was being stirred up by a car and that [fol. 13] the car was going on toward Dedeaux School. I could tell that three of the shots were fired in quick order and then a short time later two more shots were fired. I would say that we were at least a half mile from the place where the shooting occured and I am not able to say just how many shots were fired, but do know that there were at least five of them.

A short time after the car drove off toward Dedeaux I heard a car start up at Ramsey Cameron's house and it went off in the direction of Rock Hill Church. I could see the dust on the road from this car, but I was too far away to see who was in it, infact I could not see the car, but it sounded like Ramsey Cameron's old Ford truck.

After seeing the truck, or hearing the truck going up toward Rocy Hill, we rode on across the woods to Arthur Ladner's house and talked with Arthur and his wife; Harvey Malley traded bridles with Arthur, or changed bridles with him. While we were at Arthurs house, Wilton Ladner rode off and I did not see which way he went. Harvey and me stayed there for a little while and then rode on over to his house, stayed there a few minutes and then we rode on up to the rode and passed close by Ramsey Comeron's house; I guess that when we passed Ramsey's house it had been about two

hours since the shooting occured. I saw Ramsey Cam-
[fol. 14] eron and Lovander Ladner there at the house, but I did not say anything to them, but they were standing in front of the barn.

We then rode on down to Lawrence Ladner's house and we got there just a little while before dark. Lawrence Ladner was out there sheering sheep, but I don't think that there was any one else there with him. I remember that me or Harvey, one or the other of us, asked Lawrence if he had heard if anybody got bad hurt or not and he said that he did not know, that he had not heard. There was very little said, because Harvey and me then went on back home and then rode on over to F. E. Ladner's store. On our way from the store we stopped at Roy Koenenn's house and Roy told us that he saw the officers; that Mr. Reed was shot pretty bad and that the other officer got a few shots; he showed us a small shot that he said he got out of the officers face.

When the officers first questioned me regarding the shooting, I denied knowing anything about it. I did this for the reason that Ramsey Cameron and Lovander Ladner are both brother-in-laws of mine, but when Mr. Pace explained the situation to me this afternoon, I decided that I would tell the truth about it. I can not afford to get into trouble over something that I had nothing to do with. I *cant* think of anything else that I know about the shooting, if I did I would not hesitate to tell it.
[fol. 15] I have read the foregoing statement, consisting of two type written pages, beside this one, I understand this statement and swear that it is the truth to the best of my knowledge and belief.

Signed (S.) Ares J. Hoda

Subscribed and sworn to before me this 24th day of May 1944.

(S.) Clyde D. Pace, Special Investigator,
Alcohol Tax Unit.

Witnessed: (S.) Harvey Malley
(S.) W. W. Frost In. A.T.U.
(S.) Joe B. Everett

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[redacted]

JURY AND VERDICT OF GUILTY—Filed June 23, 1944

This day came into open court the United States Attorney, prosecuting for and on behalf of the United States, and also came the defendants herein in their own proper person, and by their attorneys, who being legally arraigned, plead not guilty to the above styled and numbered indictment against them; and of that they put themselves upon the country; and the United States Attorney did the like.

[fol. 16] Thereupon came Ben A Lancaster and eleven other good and lawful men who composed the jury and who, having been examined, accepted and sworn to try the issues joined between the United States and the defendants, after hearing the testimony of all witnesses, the arguments of counsel, and the instructions of the Court, and having duly considered the same, returned into open court the following verdict:

"We, the jury, find the defendants guilty as charged in the indictment."

COB#2 P992

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JUDGMENT AND COMMITMENT—June 23, 1944

On this 23rd day of June, 1944, again, came the United States Attorney, and the defendant Lovander Ladner appearing in proper person, and by his attorneys, Grayson B. Keaton and Howard McDonald and,

The defendant having been convicted on a verdict of guilty of the offenses charged in the indictment in the above-entitled cause, to wit: on counts 1, 2 and 3:

Conspire, conferedate, combine and agree to wilfully and by means and use of deadly and dangerous weap-

ons, to commit an assault on acting commissioned offi-
[fol. 17] cers of the United States: Federal Investigators and Agents of the Alcohol Tax Unit; forcibly assault said officers;

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of

Count #1: Two (2) Years; said sentence imposed on Count #1 to run concurrently with sentence imposed on Count #2;
Count #2: Ten (10) Years;
Count #3: Ten (10) Years; said sentence imposed on Count #3 to begin to run from and after the expiration of the above sentences imposed on Counts #1 and #2;

IT IS FURTHER ORDERED that a total sentence is imposed against said defendant, in this Indictment, of twenty (20) Years to serve.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the [fol. 18] United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(S.) S. C. Mize

S. C. Mize, United States District Judge.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO CORRECT SENTENCE—Filed January 22, 1955

Comes now the defendant Lovander Ladner in proper person and respectfully moves the court to correct the

aggregate sentence in the above-styled case by making the ten year sentence imposed on count three (3) concurrent with the ten year sentence imposed on count two (2), and concurrent with the two year sentence imposed on count one (1), instead of consecutive thereto, so that the aggregate sentence on all three counts will be ten (10) years instead of 20 years, for the following reason:

Counts 2 and 3 charge a single offence, and the imposition of consecutive sentences on those counts constitutes double punishment in violation of the fifth Amendment.

A supporting brief is attached hereto and is by reference incorporated herein.

Respectfully submitted

[fol. 19] (S.) Lovander Ladner, Defendant pro se
P. M. B. 64197, Atlanta, Georgia

Certificate of Service (omitted in printing)

[fol. 20]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

COPY OF LETTER—Filed February 23, 1955

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT, MISSISSIPPI

CHAMBERS OF
SIDNEY C. MIZE
DISTRICT JUDGE

Feby. 23rd, 1955.

[fol. 21] Mr. Lovander Ladner

Box PMB,
Atlanta, Ga.

Dear Sir:

I have considered your motion to change the sentence imposed upon you and have reached the conclusion that

I do not have the power to change it. This is the same type of motion you made once before and I reached the same conclusion then. I am filing an opinion in the case and herewith enclose you a copy for your file. I will sign an order on the 26th and file with the clerk that day. I am enclosing you a copy of the order that will be signed and filed.

If you keep a good conduct record later on I will recommend your parole.

Yours truly,

(S.) S. C. Mize

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

OPINION OF THE COURT ON MOTION TO CHANGE SENTENCE—

Filed February 23, 1955

The defendant who is now serving a sentence imposed by this court upon him after he was convicted by a jury under an indictment in the three counts—the first being a conspiracy to kill two ATU agents and the second and third being for an assault and battery upon each of two [fol. 22] ATU agents with deadly weapons—moves the court to change the sentence that was imposed. The defendant was represented well at the trial by counsel of his own choosing and was convicted of an assault upon James Buford Reed as charged in the second count and an assault upon W. W. Frost as charged in the third count, each assault being with a deadly weapon. The case was tried several years ago, and prior to the time the law provided for an official court reporter. There was no transcript of the testimony made nor was any bill of exceptions taken to any of the proceedings nor was there any appeal prosecuted from the conviction and sentence. However, the court recalls that the testimony showed that more than one shot was fired into the car in which the officers were riding with a prisoner they had arrested. The evidence was sufficient to convict the defendants and each count of the indictment was for an

assault upon a different officer with a deadly weapon. Each count stated a separate offense and the sentence imposed was within the limits of the law. The statute under which defendant was indicted provides that whoever assaults ANY person designated in section 114, etc., and also whoever in the commission of ANY such Acts uses a deadly weapon, etc. and very clearly makes an assault upon each officer a separate crime. Sec. 111, Title 18 of U. S. code. See also Barrett vs Hunter, 180 Fed. (2d) 510; United States vs St. Clair, 62 Fed. Supp. 795;

[fol. 23] The defendant made substantially the same motion heretofore and it was overruled See United States vs Cameron, 84 Fed. Supp. 289 and the facts are there stated.

The motion will be overruled, and an order may be drawn to this effect.

This the 23rd of Feby. 1955.

(S.) S. C. Mize, U. S. District Judge.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ORDER OVERRULING MOTION TO CORRECT SENTENCE—

Filed February 26, 1955

The motion of the defendant to set aside the sentence heretofore imposed on the defendant and to correct the sentence that was imposed upon him upon his conviction of an indictment consisting of three counts came on to be heard and the court having considered the entire record in the cause is of the opinion that the motion is without merit. I have examined the motion, the files and the entire records of the case and they show conclusively that the petitioner is not entitled to any relief and it is not necessary that he be brought into court for consideration of his motion.

It is therefore ordered by the court that the motion of the defendant, Lovander Ladner, be and the same is hereby overruled.

[fol. 24] Ordered this the 26th day of Feby. 1955.

(S.) S. C. Mize, District Judge.

COB5P275

[fol. 25] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

NOTICE OF APPEAL—Filed March 21, 1955

Pursuant to court order of Feb. 26, 1955 denying defendants "motion to correct sentence," Defendant hereby Respectfully moves to appeal the case to the U. S. Court of Appeals.

Respectfully submitted

(S.) Lovander Ladner, Defendant Pro-se
U. S. Penitentiary, Atlanta, Georgia

[fol. 26] * * * *

[fol. 27] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

COPY OF LETTER—Filed April 21, 1955

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT, MISSISSIPPI

CHAMBERS OF
SIDNEY C. MIZE
DISTRICT JUDGE

April 19, 1955

Mr. Lovander Ladner—64197-A
Box PMB
Atlanta, Georgia

Dear Sir:

The Clerk has called to my attention the Notice of Appeal filed March 21 and also your application to appeal

in Forma Pauperis, and I have considered same and have concluded to allow the appeal. I am appointing Honorable Bidwell Adam of Gulfport, Mississippi to represent you in this appeal. I do not think there is any merit in your appeal, but believe you are prosecuting it in good faith and I have instructed the Clerk to prepare [fol. 28] the record.

I am enclosing you copy of orders which I am this day signing and filing with the Clerk.

Yours truly,

S. C. Mize,
(S.) S. C. Mize, U. S. District Judge

CC: Miss Loryce E. Wharton, Clerk, United States District Court
Jackson, Mississippi
Honorable Robert E. Hauberg, United States Attorney, Jackson, Mississippi
Honorable Bidwell Adam
Gulfport, Mississippi

[fol. 29] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL—

April 19, 1955

It is ordered by the Court that the time for filing and preparing the record on appeal in the above styled cause by the Clerk be, and it is hereby extended, for a period of ninety days from this date.

ORDERED, this the 19th day of April, 1955.

(S.) S. C. Mize, United States District Judge

Cob5p-312
Filed April 21, 1955

[fol. 30] • • • •

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—

January 26th., 1956.
(omitted in printing)

[fol. 33] (File Endorsement Omitted)

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 15560

LOVANDER LADNER,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before HUTCHESON, Chief Judge, and JONES and BROWN, Circuit Judges.

OPINION—February 29, 1956

JONES, Circuit Judge: The appellant, Lovander Ladner, and another, Ramsey P. Cameron by name, were convicted on all of the charges of a three count indictment. The first count alleged conspiracy to assault of-[fol. 34] ficers of the United States while performing their official duties; the second charged an assault upon Buford Reed, a Federal Investigator and Agent of the Alcohol Tax Unit of the Treasury Department in violation of 18 U.S.C.A. § 111, formerly § 254; the third count set forth an identical assault upon W. W. Frost, another Federal Agent. The appellant was sentenced to two years on the first count and ten years on each of the other two

counts. The sentences on counts one and two were to run concurrently. The sentence on count three was to run consecutively with and begin at the expiration of the sentence on the second count conviction. No appeal was taken from the judgment.

The appellant has filed a motion under 28 U.S.C.A. §2255 for the correction of his sentence. In his motion the appellant asserts that counts two and three charge but one offense for which he could not have been properly sentenced for more than ten years. In an attached brief the appellant states that evidence at the trial "showed that the two officers were together on the front seat of an automobile, and that the defendant fired a shotgun into the vehicle". The statement does not expressly say that only one shot was fired but the decisions to which he refers show that the underlying premise of his motion was that one shot and no more was fired. On the theory that it could be shown that there was but one shot fired, it was urged before the District Court and here that but one offense was committed for which the maximum imprisonment was ten years. The District Judge filed an opinion saying, among other things, that the statute clearly makes an assault upon each officer a separate [fol. 35] crime. An order followed in which the court found the motion to be without merit and the appellant entitled to no relief. It was found too that it was not necessary that the appellant be brought into court for consideration of and a hearing on his motion.

Since no transcript was made of the testimony, we have no enlightenment from the record as to the number of shots fired. In the record is a copy of a sworn statement of Ares J. Hoda, a brother-in-law of both the appellant and his co-defendant, Ramsey P. Cameron. The statement was made two days after the shooting occurred and about a month prior to the trial. In this statement it was said by Hoda that he heard five shots fired from a place where he had, a short time before, seen the appellant and Cameron. Hoda was a half mile distant from the place where the shooting occurred. He did not attempt to identify those who were involved. How this document found its way into the record is not explained.

If introduced in evidence it must have been with the consent of appellant. It cannot be regarded, on the record before us, as proving or tending to prove any fact material to the matter under consideration.

In the court's opinion it is recited that "the court recalls that the testimony showed that more than one shot was fired", but in the order there is no such recital. On the contrary, in the order the District Judge says "I have examined the motion, the files and the entire records of the case and they show conclusively that the petitioner is not entitled to any relief and it is not necessary that he be brought into court for consideration of this motion". [fol. 36] Although the court may take judicial notice of its records and decisions, the judge should not make disposition of matters before him in reliance upon his personal recollection of what transpired in the trial of a cause before him, particularly where, as here, there has been a long lapse of time.

We have mentioned the court's opinion. On the day it was filed the District Judge wrote the appellant advising him that the motion would be denied. In the letter it was said "This is the same type of motion you made once before and I reached the same conclusion then". In the opinion it is said "The defendant made substantially the same motion heretofore and it was overruled. See *United States v. Cameron*, 84 Fed. Supp. 289, and the facts are there stated." In the Cameron case the court disposed of a motion to correct sentence under 28 U.S.C.A. §2255 filed by the appellant's co-defendant. The reported opinion does not refer to any like motion having been filed by the appellant. The record in this appeal does not show the prior motion or any order upon it. Government counsel, in their brief, comment upon the motion made by Cameron and refer to the opinion in the Cameron case, but make no reference to the prior motion of the appellant. Hence we cannot say whether there was any abuse of discretion in refusing to entertain a second motion on the same or substantially the same ground as the first. See *Hallowell v. United States*, 5th Cir. 1952, 197 F. 2d 926.

If the single firing of a shotgun, resulting in the wounding of two officers, can constitute but a single offense [fol. 37] under 18 U.S.C.A. §111, then the appellant's motion presents a material and substantial factual question as to whether it appeared from the evidence at the trial that the gun was only fired once. If there is a necessity for the determination of such a factual question there must be a hearing and the appellant is entitled to be present. *Barrett v. Hunter,* 10th Cir. 1950, 180 F. 2d 510. And see *Bell v. United States,* 5th Cir. 1942, 129 F. 2d 290. On the other hand, if a single firing of a gun resulting in the wounding of two officers may constitute two separate offenses under the statute, then it becomes immaterial whether or not there was only one or more than one discharge of the weapon, and the question of fact need not be considered.

The only decision squarely in point among the reported cases which we have seen is *United States v. Cameron, supra,* and we can hardly rely upon it as a controlling precedent. Analogous are the mail bag cases, among which are *Warner v. United States,* 5th Cir. 1948, 168 F. 2d 765, and *Ebeling v. Morgan,* 237 U. S. 625, 35 S. Ct. 710, 59 L. Ed. 1151. In the Warner case this court held that the theft of each of several mail bags constituted a separate offense. In the Ebeling case it was held that the cutting of each of several mail bags was a separate offense. In other cases it has been held that the theft of more than one mail bag justifies but one sentence. *Johnston v. Lagomarsino,* 9th Cir. 1937, 88 F. 2d 86, *Kerr v. Squier,* 9th Cir. 1945, 151 F. 2d 308. Cases of another type to which our attention is directed are the bank robbery cases where convictions followed indictments for robbery and for jeopardizing the lives of different persons in [fol. 38] separate counts. It was held by this court that a charge of entering a bank with intent to commit larceny is a separate offense from attempted robbery, although the offense of attempting to take money is merged in a charge of the aggravated form of such offense by the use of a dangerous device. *Durrett v. United States,* 5th Cir. 1939, 107 F. 2d 438, *Wells v. United States,* 5th Cir. 1941, 124 F. 2d 334. The decisions in *Hewitt v. United States,*

8th Cir. 1940, 110 F. 2d 1, *Vautrot v. United States,* 8th Cir. 1944, 144 F. 2d 740, and *Lockhart v. United States,* 6th Cir. 1943, 136 F. 2d 122, are not in conflict with the holdings in this Circuit construing the bank robbery statute. 12 U. S. C. A. §588. *Heflin v. United States,* 5th Cir., 1955, 223 F. 2d 372, is not to be regarded as a departure from the doctrines announced in the earlier decisions of this court.

Possibly closer to our problem than the mail bag or bank robbery cases are those which involve the transportation for immoral purposes of two or more women across a state line at one time in a single vehicle in violation of the Mann Act. The Tenth Circuit has adopted the rule that in such a case there has been but one offense. *Robinson v. United States,* 10th Cir. 1944, 143 F. 2d 276. A different result has been reached in this Circuit. *United States v. St. Clair,* 62 F. Supp. 795, *St. Clair v. Hiatt,* 83 F. Supp. 585, aff. 177 F. 2d 374, cert. den. 339 U.S. 967, 70 S.Ct. 983, 94 L. Ed. 1375.

The precedents in this Circuit point us toward a conclusion that the appellant here was guilty of a separate assault upon each of the two officers who were wounded [Note: The Court of Appeals corrected this opinion April 4, 1956, by striking the last three lines supra and substituting therefor the following: But see Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L. Ed. 905, in which by a divided Court the Supreme Court reached a different result. This decision notwithstanding however, we believe that the appellant here was guilty of a separate assault upon each of the two officers who were [fol. 39] wounded] by his gun fire, and this whether he fired only once or more than once. Reason and principle are more impelling. The Supreme Court has provided us with what we regard as a sound test. It has said:

> "A conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction of the other without proof of an additional fact." *Ebeling v. Morgan, supra,* cf. *Durrett v. United States, supra.*

The rule is equally applicable to the several counts of a single indictment as to separate indictments. The evidence here would have been sufficient to warrant the conviction of an assault upon either of the officers without any showing of the fact of an injury to the other. So measured, the order denying the motion to correct the sentence should be and is

AFFIRMED.

[fol. 40] IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15560

LOVANDER LADNER,

versus

UNITED STATES OF AMERICA

JUDGMENT—February 29, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1956

(Title Omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 10, 1956

UPON CONSIDERATION of the application of petitioner, IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 28th, 1956.

(S.) Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 10th day of May, 1956.

[fol. 44] IN SUPREME COURT OF THE UNITED STATES

No. 80 Misc. ...., October Term, 1956

LOVANDER LADNER,
Petitioner,

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO the United States Circuit Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—

November 13, 1956

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is trans-

ferred to the appellate docket as No. 568. One hour and a half is allowed for argument in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brennan took no part in the consideration or decision of this application.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. [redacted] 2

LOVANDER LADNER,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

HAROLD ROSENWALD,
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Boston, Mass.

Counsel for Petitioner
(Appointed by this Court)

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OCTOBER TERM, 1957

No. 41

LOVANDER LADNER,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court appears at pages 13 *et seq.* of the Record. The opinion of the Court of Appeals, as amended (R. 21), is found at pages 17 *et seq.* of the Record and is reported at 230 F. (2d) 726.

Jurisdiction

This proceeding originated with a motion to correct the sentence imposed upon petitioner (R. 11), made on January

22, 1955, pursuant to 28 U. S. C. § 2255. The order of the District Court denying the motion, filed on February 26, 1955 (R. 14), was affirmed by the judgment of the Court of Appeals entered on February 29, 1956 (R. 22). On May 10, 1956, Mr. Justice Black extended the time for filing a petition for certiorari to and including June 28, 1956 (R. 23). The petition was filed on June 21, 1956, and was granted on November 13, 1956 (R. 23). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See *United States* v. *Hayman*, 342 U. S. 205, 209, note 2 (1952).

Question Presented

1. Whether the single discharge of a deadly or dangerous weapon, which resulted in the wounding of two Federal agents while engaged in the performance of their official duties, constituted two distinct violations of Section 254 of former Title 18 of the U. S. Code (1940 ed.) for which two maximum sentences of imprisonment, running consecutively, could be imposed.[1]

Statutory Provisions Involved

1. Petitioner's motion to correct his sentence was made pursuant to Section 2255 of Title 28, U. S. C., which provides as follows:

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[1] In its brief in opposition to the petition for certiorari, the Government urged that petitioner would not be entitled to a hearing before the district court under Section 2255 unless it should appear from the face of the indictment that no Federal offense could possibly have been committed. Cited in support of this contention were *Goto* v. *Lane*, 265 U. S. 393 (1924) and *Sunal* v. *Large*, 332 U. S. 174 (1947), both of which held that a petition for a writ of habeas corpus could not be used as a substitute for an appeal. In the light of the explicit language and the purposes of Section 2255, the Government's point is frivolous and will not be argued in this brief (R. 20). *United States* v. *Hayman*, *supra*, 342 U. S. 205 (1952).

"§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

2. Petitioner was indicted under Section 254 of former Title 18, U. S. C. (1940 ed.), which provided at all material times:

"§ 254. Resisting, interfering with, or assaulting Federal officer; penalty.

"Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in section 253 of this title while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

3. Section 253 of former Title 18, U. S. C. (1940 ed.), referred to in said section 254, provided at all material times:

"§ 253. Killing Federal officer; penalty.

"Whoever shall kill, as defined in sections 452 and 453 of this title, any United States marshal or deputy

United States marshal or person employed to assist a United States marshal or deputy United States marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, post-office inspector, Secret Service operative, any officer or enlisted man of the Coast Guard, any employee of any United States penal or correctional institution, any officer, employee, agent, or other person in the service of the customs or of the internal revenue, any immigrant inspector or any immigration patrol inspector, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Division of Grazing of the Department of the Interior, or any officer or employee of the Indian field service of the United States, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under section 454 of this title."

Statement of the Case

Petitioner and one Cameron were jointly indicted under a three-count indictment on June 13, 1944 in the United States District Court for the Southern District of Mississippi, Southern Division (R. 1). The first count charged that petitioner and Cameron, on or about May 22, 1944, conspired, by means and use of deadly and dangerous weapons, to commit an assault on "Agents of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the per-

formance of their official duties, and while such officers were then and there engaged in the performance of their official duties" (R. 1); the second count charged that petitioner and Cameron, on or about May 22, 1944, "by means and use of deadly and dangerous weapons, to wit: loaded shotguns" did "forcibly assault" one Reed, an "Agent of the Alcohol Tax Unit * * *, on account of * * * and while * * * engaged in the performance of his official duties", and "shot and seriously wounded the said * * * Reed" (R. 3, 4); and the third count charged that petitioner and said Cameron committed a similar assault at the same time and place upon another agent of the Alcohol Tax Unit, one Frost, and "shot and wounded" the said Frost (R. 4, 5).

On June 23, 1944, petitioner and Cameron were arraigned and pleaded not guilty to the indictment; upon the same day they were tried by a jury before United States District Judge Sidney C. Mize, and were found guilty as charged in the indictment (R. 10). No transcript of the testimony was taken (R. 13). On the same day petitioner was sentenced to imprisonment for two years on the first count of the indictment, said sentence to run concurrently with the sentence on the second count; to imprisonment for ten years on the second count; and to imprisonment for ten years on the third count, said sentence to begin to run upon the expiration of the sentences on the first two counts (R. 11). Thus petitioner was sentenced to twenty years imprisonment (R. 11). No appeal was taken from the judgment of conviction or the sentence of the District Court (R. 13).

On January 22, 1955, petitioner filed a motion *pro se* to correct the sentence imposed upon him by making the sentence under the third count of the indictment run concurrently with the sentences under the second and first counts (R. 11, 12). The motion alleged that the second and third

counts charge a single offense[2] (R. 11). Pursuant to the provisions of 28 U. S. C. § 2255, the motion was filed in the court which had imposed the sentence, and was considered by District Judge Mize.

This motion was denied by an order entered on February 26, 1955 (R. 14). In an opinion filed on February 23, 1955, Judge Mize stated that "the court recalls that the testimony showed that more than one shot was fired into the car in which the officers were riding with a prisoner they had arrested" (R. 13). He conceded, however, that no transcript of the testimony at the trial had been made and that no bill of exceptions had been taken to any of the original proceedings (R. 13). Making an obvious error of identity, Judge Mize stated, both in his opinion and in a letter to petitioner, that petitioner had previously made a similar motion, and cited in his opinion, in support of such statement, his decision denying such a motion made by petitioner's co-defendant, Cameron[3] (R. 12-14, 19).

Petitioner was granted leave to appeal *in forma pauperis* from Judge Mize's order to the Court of Appeals for the Fifth Circuit (R. 15, 16). The United States Attorney designated as part of the record on appeal a sworn statement of one Ares J. Hoda in which Hoda stated, among

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[2] The motion does not specifically allege that there was only a single discharge of a gun by petitioner or his co-defendant; but such a claim is implicit in the brief of petitioner in support of his motion. In any event the matter has proceeded on the assumption that petitioner claims that "one shot and no more was fired" (R. 18, 13).

We do not mean to concede that, if two or more shots were fired in rapid succession in a single transaction, each shot would constitute a separate offense under the statute. See Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805, 807 (1937). However, that question is not before the Court and will not be argued in this brief.

[3] Judge Mize was also confused about the indictment, referring to the charge of the first count as "conspiracy to kill two ATU agents" (R. 13). This is, of course, contrary to the fact (R. 1).

other things, that he heard five shots fired at a place where he had seen petitioner and Cameron a few minutes before, but that the shots were fired when he was at least a half mile from that place (R. 5, 8). Except for this document, which is obnoxious to our concepts of a fair criminal proceeding, the record is devoid of any evidentiary matter.

The Court of Appeals rejected the statement of Hoda as having no probative value, and disregarded the personal recollection of Judge Mize concerning the number of shots fired (R. 18, 19). Moreover, the Court stated that if a single discharge of a shotgun, which resulted in the wounding of two Federal officers, could constitute but a single violation of the statute, petitioner would have been entitled to a hearing on his motion to determine whether the evidence at the trial showed that the gun was only fired once (R. 20). But the Court of Appeals held that petitioner was guilty of a separate assault upon each of the officers who were wounded without regard to the number of shots fired, and upon this ground affirmed the order denying petitioner's motion (R. 21, 22).

The opinion of the Court of Appeals was filed on February 29, 1956 (R. 17). That opinion was amended by the Court on April 4, 1956, apparently after the case of *Bell* v. *United States*, 349 U. S. 81 (1955) had come to its attention (R. 21).

On June 21, 1956, petitioner filed in this Court his petition for a writ of certiorari and a motion for leave to proceed *in forma pauperis*. Both the motion and the petition were granted on November 13, 1956 (R. 23). 352 U. S. 907. On January 14, 1957, this Court appointed petitioner's present counsel to serve as counsel in the case. 352 U. S. 959.

Petitioner was released on parole from the United States Penitentiary, Atlanta, Georgia, on August 30, 1956, and

will remain under supervision until the expiration of his sentence.[4]

Summary of Argument

This case calls for the determination of the "unit of prosecution" under Section 254 of former Title 18, U. S. C. (1940 ed.) or, more precisely, under the second clause of that Section.

The Court of Appeals held that Section 254 denounced the offense of assault with a dangerous weapon and that the number of persons assaulted, even by a single blow, measured the number of violations of the statute in this case. However, a careful reading of the language of Section 254 is sufficient to show that the offense proscribed by the second clause is the use of a deadly or dangerous weapon for a number of forbidden purposes, and that, accordingly, the unit of prosecution is such use. It follows that, if only one shot was fired in this case, there was only one offense, and this would be true whether several officers were struck by the shot, or, indeed, none was struck. This construction of the statute, derived from its own terms, is supported by the legislative history of Section 254 and of Section 111 of present Title 18, which stems in part from Section 254.

Determination of the unit of prosecution under a Federal criminal statute involves a careful inquiry into the intention of Congress in enacting the particular statute. Although decisions under other statutes cannot reveal that

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[4] It is clear that the release of petitioner from confinement does not make the case moot, in view of his continuing obligations as a parolee and his liability to being returned to prison if he should violate his parole agreement. Cases where the effects of a decision would be much less substantial have been held not to be moot. See *Fiswick* v. *United States*, 329 U. S. 211, 220-223 (1946); *United States* v. *Morgan*, 346 U. S. 502, 512-513 (1954).

intention in respect of Section 254, several groups of cases arising under other statutes support the foregoing interpretation of the statute here involved.

This case and its companion cases involve critically important questions in the administration of criminal justice in the Federal courts. Those questions relate to the permissibility of the finding of multiple offenses, and of multiple trials and punishments, predicated upon a single criminal act or transaction. Recent decisions of this Court have affirmed the doctrine that multiplication of such offenses, trials and punishments involves penalties and other hardships so severe that it will be sanctioned only when clearly authorized by Congress. In one of those decisions this Court has abandoned the artificial rule of thumb, known as the "same evidence" rule, for determining whether one or more offenses have been committed. Since there is no clear expression of the intention of Congress authorizing multiple sentences for a single act in violation of Section 254, the decision below is erroneous and should be reversed.

ARGUMENT

I

The Offense Proscribed Under the Second Clause of Section 254 of Former Title 18, U. S. Code Is Defined in the Statute as the Use of a Deadly or Dangerous Weapon for Any of the Forbidden Purposes.

The first clause of Section 254 of former Title 18, U. S. C, imposed a fine not more than $5,000 or imprisonment for not more than three years, or both, upon any person who "shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in Section 253 of this title while engaged in the performance of his official duties, or

shall assault him on account of his official duties." Under the second clause a fine not more than $10,000 or imprisonment for not more than ten years, or both, were imposed upon anyone who "in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon."

It is clear from the words of the statute that the use of a deadly or dangerous weapon was condemned by the second clause, and that the consequences of such use are not relevant in determining whether the statute has been violated or whether more than one violation has occurred. Thus, if petitioner had fired a shotgun in the air, or merely brandished it as a club, in opposing, impeding or intimidating the two Federal officers who were here involved, he would have been guilty under the second clause. But in that case the number of Federal officers who were impeded or intimidated would surely not have measured the number of violations of the second clause. *Cf*: *Lockhart* v. *United States,* 136 F. (2d) 122 (C. A. 6th, 1943); *Dimenza* v. *Johnston,* 130 F. (2d) 465 (C. A. 9th, 1942). In the same way the single discharge of a shotgun at several Federal officers could constitute only a single violation of the second clause, and this would be true whether two or six of such officers were struck by the shot, or the shot missed the mark completely.

This case has proceeded upon the assumption that the offense here involved was an assault and battery upon Federal officers by means of a deadly weapon. Thus, the second count of the indictment alleges that petitioner and Cameron "shot and seriously wounded" Agent Reed (R. 4), and the third count alleges that petitioner and Cameron "shot and wounded" Agent Frost (R. 5). These allegations are clearly surplusage, but obfuscated the issue of the precise offense that was charged. The judgment on the

verdict of the trial court referred to the conviction under the second and third counts with the phrase "forcibly assault said officers," which is substantially the language of the first clause of the statute, and made no reference to the use of a deadly or dangerous weapon, the gravamen of the offense proscribed by the second clause (R. 10, 11). In his opinion on petitioner's motion to change the sentence, Judge Mize referred to the two clauses of Section 254, relied heavily upon the word "any" in each clause, and concluded that the statute "very clearly makes an assault upon each officer a separate crime" (R. 14). The Court of Appeals, in its amended opinion, held that petitioner was "guilty of a separate assault upon each of the two officers who were wounded by his gun fire * * * " (R. 21). Both of the lower courts virtually ignored the dichotomy of the statute, under which the use of a deadly weapon for any of a number of purposes is made an offense, and the offense is completed when the weapon is used regardless of the consequences.

An example of a statute which prohibits assault with a dangerous weapon may be found in Article 128(b) of the Uniform Code of Military Justice, Act of August 10, 1956, c. 1041, § 928, 70A Stat. 75 (10 U. S. C. § 928), which provides:

"(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct."

In subsection (b)(2) Congress has made an assault and the intentional infliction of bodily harm an offense, and it is clear that such infliction of injury is an essential element of a violation of that provision. Quite different is Section 254, which is silent concerning the consequences of the forbidden act.

Where a statute, such as the above subsection (b)(1) of Article 128 of the Military Code, simply prohibits assault with a dangerous weapon, it may be necessary to seek extraneous aid to determine whether the striking of two persons *uno ictu* constitutes one or two assaults under the statute. But under the proper construction of Section 254, there is no such need. For under the second clause of that Section the offense is clearly defined as the use of a deadly or dangerous weapon.

II

The Legislative History of Section 254 Supports the Construction of the Statute Derived from Its Own Terms.

Section 254 of former Title 18 found its origin in Section 2 of "An Act To provide punishment for killing or assaulting Federal officers", approved May 18, 1934, 48 Stat. c. 299, p. 780. The first section of that statute condemned the killing of certain Federal officers, and, with immaterial amendments, became Section 253 of former Title 18.

The Act of May 18, 1934, originated in the Senate as S. 2080 in the 73rd Congress, 2d Session. This bill was introduced into Congress at the request of the Department of Justice. In virtually identical letters, addressed to the respective chairmen of the Senate and House Committees on the Judiciary by Attorney General Homer Cummings,

the purposes of, and need for, the legislation were set forth.[5]

In these letters the Attorney General urged the Congress to adopt general legislation for the protection of Federal

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[5] The letter to Senator Ashurst, Chairman of the Senate Committee on the Judiciary, is as follows:

"Department of Justice,
January 3, 1934.

"Hon. Henry F. Ashurst,
Chairman, Committee on the Judiciary,
United States Senate,
Washington, D. C.

My dear Senator:

"I wish again to renew the recommendation of this Department that legislation be enacted making it a Federal offense forcibly to resist, impede, or interfere with, or to assault or kill, any official or employee of the United States while engaged in, or on account of, the performance of his official duties. Congress has already made it a Federal offense to assault, resist, etc., officers or employees of the Bureau of Animal Industry of the Department of Agriculture while engaged in or on account of the execution of their duties (sec. 62, C. C.; sec. 118, title 18, U. S. C.); to assault, resist, etc., officers and others of the Customs and Internal Revenue, while engaged in the execution of their duties (sec. 65, C. C.; sec. 121, title 18, U. S. C.); to assault, resist, beat, wound, etc., any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the United States (sec. 140, C. C.; sec. 245, title 18, U. S. C.); and to assault, resist, etc., immigration officials or employees while engaged in the performance of their duties (sec. 16, Immigration Act of Feb. 5, 1917, c. 29, 39 Stat. 885; sec. 152, title 8, U. S. C.). Three of the statutes just cited impose an increased penalty when a deadly or dangerous weapon is used in resisting the officer or employee.

"The need for general legislation of the same character, for the protection of Federal officers and employees other than those specifically embraced in the statutes above cited, becomes increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel; and Congress has recognized this fact at least to the extent indicated by the special acts above cited. This Department has found need for similar legislation for the adequate protection of the special agents of its division of investigation, several of whom have

officers and employees other than those covered by certain specific statutes referred to by the Attorney General.

Among the specific statutes referred to by the Attorney General was Section 140 of the Criminal Code, which, in the language of the Attorney General, made it an offense "to assault, resist, beat, wound, etc., any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the

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been assaulted in the course of a year, while in the performance of their official duties.

"In these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government. It would seem to be preferable, however, instead of further extending the piecemeal legislation now on the statute books, to enact a broad general statute to embrace all proper cases, both within and outside the scope of existing legislation. Other cases in point are assaults on letter carriers, to cover which the Post Office Department has for several years past sought legislation; and the serious wounding, a couple of years ago, of the warden of the Federal Penitentiary at Leavenworth by escaped convicts outside the Federal jurisdiction. In the latter case it was possible to punish the escaped convicts under Federal law for their escape; but they could not be punished under any Federal law for the shooting of the warden.

"I have the honor, therefore, to enclose a copy of S. 3184, which was introduced at the request of this Department in the 72d Congress and to urge its reintroduction in the present Congress, and to express the hope that it may receive prompt and serious consideration of your Committee.

Respectfully,
Homer Cummings,
Attorney General"

S. R. No. 535, 73rd Cong., 2d Sess. (March 20, 1934).

The letter to Congressman Hatton W. Summers, Chairman of the House Committee on the Judiciary, is identical with the letter to Senator Ashurst except for the last paragraph. That paragraph, substituted for the last paragraph of the Ashurst letter, refers to H. R. 10588 and states that that bill had been introduced in the 72d Congress by Congressman Summers at the request of the Department of Justice.

H. R. No. 1455, 73rd Cong., 2d Sess. (May 3, 1934).

United States." Furthermore, in discussing the need for the proposed legislation, the Attorney General referred to an incident in which the warden of the Federal Penitentiary at Leavenworth had been seriously wounded by escaped convicts. It is clear, therefore, that the attention of Congress was directed to the possibility of punishing wounding as a specific offense. Nevertheless, Section 254 does not mention such an offense.

There is little more in the legislative history of S. 2080 that casts any light on our problem. The report of the House Committee on the Judiciary contains the following statement:

> "The second paragraph imposes a penalty for forcibly resisting or interfering with any such Federal officer while engaged in the performance of his official duties, or for assaulting him on account of the performance of his official duties. If a dangerous weapon is used in the commission of any such offense the penalty is increased." H. R. No. 1455, 73rd Cong. 2d Sess., *supra.*

This statement merely paraphrases the statute and adds nothing to its meaning.

The progress of S. 2080 through Congress is not remarkable. Certain amendments, which have no direct bearing on our problem but which show that the bill was given careful consideration, were adopted by the House of Representatives. Subsequently, the bill went to conference, the House amendments were amended (H. R. No. 1593, 73rd Cong. 2d Sess.), and the bill was thereafter enacted into law.

It may be concluded that the legislative history of Section 254 shows that Congress, with the aid of the Department of Justice, intended to speak in the language of the statute and to say nothing more. In particular, Congress

refrained from taking cognizance of the effects of the acts proscribed in the statute, including the wounding of Federal officers.

III

The Legislative History of Section 111 of Title 18, U. S. Code Further Supports the Construction of Section 254 Derived from Its Own Terms.

Section 111 of Title 18, U. S. C. now provides:

> "§ *111. Assaulting, resisting, or impeding certain officers or employees*
>
> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 1114 of Title 18 makes it an offense to kill certain officers and employees of the United States, including "any officer, employee or agent * * * of the internal revenue." Accordingly, Section 111 would now apply to a case like the present case.

Section 111 was enacted as part of the revision of Title 18 by the Act of June 25, 1948, c. 645, 62 Stat. 683, 688. Section 1114 was enacted as part of said revision of Title 18 (62 Stat. 683, 756), and was amended in immaterial respects by the Act of May 24, 1949, c. 139, § 24, 63 Stat. 89, 93. Neither Section 111 nor Section 1114 was in effect when the offense of petitioner occurred.

The sources of Section 111 of Title 18 are stated by the Committee on the Judiciary of the House of Representatives in its report on the 1948 revision of Title 18 as follows:

"Based on title 18, U. S. C. 1940 ed. §§ 118, 254 (Mar. 4, 1909, ch. 321, § 62, 35 Stat. 1100; May 18, 1934, ch. 299, § 2, 48 Stat. 781).

"This section consolidates sections 118 and 254 with changes in phraseology and substance necessary to effect the consolidation.

"Also the words 'Bureau of Animal Industry of the Department of Agriculture' appearing in section 118 of title 18, U. S. C., 1940 ed., were inserted in enumeration of Federal officers and employees in section 1114 of this title.

"The punishment provision of section 254 of title 18, U. S. C., 1940 ed., was adopted as the latest expression of Congressional intent. Thus consolidation eliminates a serious incongruity in punishment and application."

H. R. No. 304, 80th Cong. 1st Sess., p. A 12 (April 24, 1947).

Section 118 of Title 18, prior to the 1948 codification, provided:

"§ 118. (Criminal Code, section 62.) Molesting Animal Industry employees; using deadly weapon.

"Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not more than $1,000, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any officer or employee of the Bureau of Animal Industry of the Department

of Agriculture in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall be fined not more than $1,000, or imprisoned not more than five years, or both." 18 U. S. C. § 118 (1940 ed.).

Under the consolidation of this statute of limited application with the more general but cognate statute, Section 254 of former Title 18, the inconsistency in the maximum imprisonment terms of the two statutes was resolved by adopting the three year and ten year penalties of Section 254, as the Committee report indicates. Expansion of the reach of the consolidated statute, Section 111 of present Title 18, to include employees of the Bureau of Animal Industry was achieved by the simple expedient of adding such employees to the list of Federal employees in Section 1114 of present Title 18.

Section 118 of former Title 18 was taken *ipsissimis verbis* from the Criminal Code of 1909. Act of March 4, 1909, c. 321, § 62, 35 Stat. 1088, 1100. The statute found its origin in the Act of March 3, 1905, c. 1496, 33 Stat. 1264. But the provision in the original statute, from which Section 118 was derived, reads as follows:

"Sec. 5. That every person who forcibly assaults, resists, opposes, prevents, impedes, or interferes with any officer or employee of the Bureau of Animal Industry of the United States Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than one year, or by both such fine and imprisonment; *and every person who discharges any deadly weapon at any of-*

ficer or employee of the Bureau of Animal Industry of the United States Department of Agriculture, or uses any dangerous or deadly weapon in resisting him in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall, upon conviction, be imprisoned at hard labor for a term not more than five years or fined not to exceed one thousand dollars." (Italics supplied) 33 Stat. 1265.

In addition to making some immaterial changes in phraseology, the authors of the 1909 Criminal Code, in substance, dropped the italicized words from the original statute, presumably because they were deemed redundant and not with the purpose of altering the original offense. See H. R. No. 304, 80th Cong. 1st Sess., *supra,* at pages 2, 3 (1947).[6] Yet those words clearly disclose the intention of Congress to punish the discharge, or other use, of a dangerous weapon without regard to the consequences. And in each of the few cases reported under the deadly weapon prohibition of the statute, the offense laid was apparently conspiracy to use deadly and dangerous weapons upon employees of the Bureau of Animal Industry. See *Thornton* v. *United States,* 2 F. (2d) 561 (C. A. 5th, 1924), affirmed, 271 U. S. 414 (1926); *Carter et al.* v. *United States,* 38 F. (2d) 227 (C. A. 5th, 1930).

As we have shown, the consolidation of Sections 118 and 254 of former Title 18 to become Section 111 of present

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[6] Referring to the 1909 revision of the Criminal Code, the Committee on the Judiciary stated: "It brought together statutes relating to the same subject, and omitted redundant and obsolete laws. However, no sweeping changes were made then. Actually, the Commission added just 21 new sections, only 10 of which created new offenses."

Title 18 was intended to eliminate "a serious incongruity in punishment and application." *Supra,* p. 18. Had there been any further purpose, it would have surely been mentioned in the section by section explanation of the proposed new Title 18 by the House Committee on the Judiciary in its report cited above. It must be concluded that that Committee considered the offenses under the consolidated sections to be in substance identical. Yet we have shown that one of those statutes, in its original form, explicitly condemned the discharge of a weapon without taking into account the consequences of such discharge. It follows that the other statute, which is here involved, should be similarly construed.

IV

Even if the Interpretation of Section 254 by the Courts Below Were Correct Petitioner Committed Only a Single Violation of That Statute.

For the present argument we accept the assumption of the courts below that Section 254 prohibited assault with a dangerous weapon. More precisely, we assume, as apparently the courts below did, that Section 254 should be read as if the words "(with) a deadly or dangerous weapon" were transposed from the second clause to the first clause and were inserted after the words "shall assault him". Or we could assume, *arguendo,* that petitioner were charged, under the first clause, in two counts with simple assaults on two Federal officers accomplished by a single blow of his fist.

Whether a single blow which had an impact on two Federal officers constituted one or two violations of Section 254 depends on the intention of Congress in enacting

the statute.[7] *Bell* v. *United States, supra,* 349 U. S. 81 (1955). That Congress could have imposed double punishment in such a case is conceded (see *Badders* v. *United States,* 240 U. S. 391 (1916)); the question is whether it has done so. *Bell* v. *United States, supra.*

The issue under the statute involved here is *res nova* in this Court. Furthermore, except for the decision of Judge Mize in an identical case involving petitioner's co-defendant, *United States* v. *Cameron,* 84 F. Supp. 289 (S. D. Miss. S. D., 1949), there is no precedent for the decision below. Nor is there any decision on the point under Section 118 of former Title 18 or Section 111 of the present Title.

The language of the statute is ambiguous, even under the construction adopted by the courts below. Although Section 254 prohibited certain acts affecting "any person designated in section 253", it does not follow that the unit of prosecution is the impact of the wrongful act upon each such person. The use of the words "any woman or girl" in the Mann Act was held by this Court not to indicate a Congressional intent to inflict separate punishment for the illicit transportation of each of two women simultaneously. *Bell* v. *United States, supra. Cf: Dimenza* v. *Johnston, supra,* 130 F. (2d) 465 (C. A. 9th, 1942); *Johnston* v. *Lagomarsino,* 88 F. (2d) 86 (C. A. 9th, 1937).

Decisions under other statutes cannot disclose the intention of Congress in enacting Section 254, but support the claim of petitioner.

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[7] Mr. Justice Story has stated the controlling principle as follows: "In short, it appears to me that the proper course, in all these cases, is, to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Winn,* 3 Sumn. 209, 211, 212 (C. C. Mass., 1838), quoted in *United States* v. *Lacher,* 134 U. S. 624, 628 (1890).

Conflict in the cases[8] under the Mann Act was resolved by *Bell* v. *United States, supra,* which held that the unit of prosecution was the illicit act of transportation and that the number of women transported in one act of transportation was not material. In its first opinion herein the Court of Appeals seemed to be influenced by the Mann Act cases in its Circuit, which had held the transportation of each woman to be a separate offense (R. 21); but later, when the *Bell* case came to its attention, the Court refused to follow it (R. 21).

Doubtless the Government will distinguish the *Bell* case on the ground that the basis of Federal jurisdiction under the Mann Act is the act of transportation in interstate commerce, whereas in the present case the basis of jurisdiction is interference with a Federal officer in the performance of his duties and such interference is personal as to each officer. But in the *Bell* case the Government argued that the purpose of the Mann Act is to protect each woman and that a separate offense is committed in respect of each woman transported. See 99 L. Ed. 908, 909. In any event the *Bell* decision did not rest on any precise determination of the basis of jurisdiction but on the principle that ambiguity in the penal provisions of a criminal statute "will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes." *Bell* v. *United States, supra,* 349 U. S. at 84. The short answer to any attempt to escape the impact of the *Bell* case is that Section 254, like the Mann

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[8] In accord with the *Bell* case was *Robinson* v. *United States,* 143 F. (2d) 276 (C. A. 10th, 1944). *Contra: Crespo* v. *United States,* 151 F. (2d) 44 (C. A. 1st, 1945), cert. dismissed, 327 U. S. 758 (1946); *St. Clair* v. *Hiatt,* 83 F. Supp. 585 (N. D. Ga., 1949), aff'd 177 F. (2d) 374 (C. A. 5th, 1949), cert. denied, 339 U. S. 967 (1950); *United States* v. *St. Clair,* 62 F. Supp. 795 (W. D. Va., 1945).

Act, does not provide multiple penalties for the multiple consequences of a single act.

The mail bag cases, cited by the Court of Appeals, do not support its decision. In *Ebeling* v. *Morgan,* 237 U. S. 625 (1915), under a statute making it an offense to "tear, cut, or otherwise injure any mail bag * * * with intent to rob or steal any such mail," this Court held that the cutting of each mail bag was a separate violation even though the bags in question were all cut in a single transaction. That case involved a series of acts, whereas in the instant case there was only one act. See *Morgan* v. *Devine,* 237 U. S. 632, 640 (1915). This distinction was made by the Court of Appeals for the Ninth Circuit in *Johnston* v. *Lagomarsino, supra,* 88 F. (2d) 86 (C. A. 9th, 1937), where the simultaneous theft of three parcels from a mail pouch was held to be only one violation of a statute which made it an offense to steal from the mail "any letter, postal card, package", etc. The Court of Appeals stated: "To take several letters from a mail depository simultaneously and continuously is one act and comprehends one intent." 88 F. (2d) at page 88. Nothing could more certainly be a single act than the discharge of a shotgun, achieved by the pressure of a finger on the trigger.

Under the same statute that was involved in the *Lagomarsino* case, the same Court has held that the simultaneous theft of three mail bags is only one offense. *Kerr* v. *Squier,* 151 F. (2d) 308 (C. A. 9th, 1945). The Court rested its decision on the ground that the bags were taken in one transaction, and avoided the Draconian decision in the *Ebeling* case by distinguishing it on the dubious ground that cutting mail bags necessarily involves successive acts whereas they can be stolen simultaneously. See, *contra: Warner* v. *United States,* 168 F. (2d) 765 (C. A. 5th, 1948).

Cases under one phase of the Bank Robbery Act (12 U. S. C. (1946 ed.) § 588 b, currently 18 U. S. C. § 2113)

culminate in the recent decision of this Court in *Prince* v. *United States*, 352 U. S. 322 (1957).[9] There it was held that entering a bank with intent to commit robbery and the consummation of such robbery, which are separately proscribed by the statute, constitute only one offense. Absence of any evidence of Congressional intention to impose multiple punishment, where the unlawful entry is followed by an actual robbery, and some evidence to the contrary in the legislative history of the statute, supplied the grounds for the decision. Those grounds are equally present in the instant case.

The courts of appeals seem to be in agreement that "the offense of bank robbery by the use of deadly weapons as defined in § 588 b (b) [of Title 12, U. S. C. (1946 ed.)] is the same offense described in § 588 b (a) aggravated by the use of a deadly weapon, and that Congress did not intend to define two separate offenses but only one * * *". *Dimenza* v. *Johnston, supra,* 130 F. (2d) 465, 466 (C. A. 9th, 1942); *Vautrot* v. *United States,* 144 F. (2d) 740 (C. A. 8th, 1944); *Hewitt* v. *United States,* 110 F. (2d) 1 (C. A. 8th, 1940), cert. denied, 310 U. S. 641 (1940); *Lockhart* v. *United States, supra,* 136 F. (2d) 122 (C. A. 6th, 1943); *Wells* v. *United States,* 124 F. (2d) 334 (C. A. 5th, 1941); *Durrett* v. *United States,* 107 F. (2d) 438 (C. A. 5th, 1939).

Much more closely related to the present problem are the cases which hold that there is only one violation of former Section 588 b (b) of Title 12, U. S. C. where the lives of more than one person are put in jeopardy by the use of a dangerous weapon in the commission of a bank robbery. *Lockhart* v. *United States, supra; Dimenza* v. *Johnston, supra.* Yet the statute made it an offense to put in jeopardy the life of "any person". Surely these cases support our contention, *supra* at page 11, that the use of a

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[9] Prior conflicting decisions of the courts of appeals are cited in this Court's opinion. 352 U. S. at 324, ft. nt. 3.

deadly or dangerous weapon to resist or impede several Federal officers would be a single violation of Section 254, and that, accordingly, the use of such a weapon to assault two Federal officers would similarly constitute a single offense.

Application of general law in determining the punishments prescribed by Section 254, as construed by the Court of Appeals, is of no avail. For the general law cannot disclose the intention of Congress in enacting Section 254. Moreover, that law is clouded with confusion and conflict.

It has been held that a conviction of assault and battery and wounding a person bars a subsequent indictment of the same defendant for the same offense committed upon another person where both alleged offenses "were at the same place and in the same affray, and the wounds made by the same instrument and by the same stroke." *State* v. *Damon,* 2 Tyler 387, 390 (Vt., 1803). *Cf: Gunter* v. *The State,* 111 Ala. 23 (1895). See *Wharton's Criminal Law* (12 ed. 1932), sec. 34. *Contra: Berry* v. *State,* 195 Miss. 899 (1944). *Cf: Regina* v. *Gray,* 5 Ir. L. Rep. 524 (1843). However, the *Damon* case is said to represent the minority view. See *Horack, The Multiple Consequences of a Single Criminal Act, supra,* 21 Minn. L. Rev. 805 (1937) at page 808. In cases of negligent homicide of more than one person by a single act, the majority of the decisions hold that there is only one offense. *People* v. *Barr,* 259 N. Y. 104 (1932). See *State* v. *Cosgrove,* 103 N. J. L. 412 (1926). See *Horack, op. cit. supra,* 21 Minn. L. Rev. at page 809. *Contra: State* v. *Fredlund,* 200 Minn. 44 (1937); *Lawrence* v. *Commonwealth,* 181 Va. 582 (1943).

The doctrine that a separate criminal offense is committed with respect to each victim of the criminal conduct is supported on the ground that each victim can maintain a civil action for damages against the wrongdoer. See *Wharton—Criminal Pleading & Practice* (9 ed. 1889), at

page 336. But the civil consequences of the act have no bearing upon the question of criminal responsibility. See *State* v. *Damon, supra,* 2 Tyler at page 390. Sometimes the courts, in finding multiple offenses, betray a purpose of inflicting severe punishment because of the number of victims of the single act. See, *e. g., State* v. *Fredlund, supra.*[10] Indeed, it seems fair to say that the courts have followed their own predilections in these cases and have assigned equally convincing reasons for their conflicting conclusions.

We conclude that the rationale of some of the decisions under other Federal statutes tends to support the claim of petitioner and that the cases under state statutes and the common law establish no doctrine that is applicable here.

V

In the Absence of Evidence of a Contrary Intention of Congress Section 254 Should Be Construed Not to Provide for Multiple Punishments.

Whether Section 254 is interpreted to prohibit the use of a dangerous weapon, as we have urged, or to prohibit assault with a dangerous weapon, as the courts below have held, there is no provision in the statute for double punishment for a single act. The legislative history of the statute, and of a related statute, tends to show that Congress did not intend to provide for such punishment. In these circum-

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[10] The Court stated, 200 Minn. at 54:

> "In view of present-day conditions, where murderous gangs by means of high-powered machine guns, sawed-off shotguns, and the like often cause death to our citizens, and where great bodily injury or death to many may be the result of a single discharge of such weapons, it would indeed be a sad condition of affairs were we to give a narrow construction to the state's right to protect its people."

stances the statute should be strictly construed to provide for single punishment for a single criminal act.

Proclamation of the controlling principles has been made in recent decisions of this Court. See *Prince* v. *United States, supra,* 352 U. S. 322 (1957); *Bell* v. *United States, supra,* 349 U. S. 81 (1955); *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218 (1952). Congress can establish multiple offenses and multiple punishments by explicit words when it has the will to do so. Where statutory provisions for criminal penalties are inexplicit, the doubt will be resolved "against the imposition of a harsher punishment." *Bell* v. *United States, supra,* 349 U. S. at page 83. Multiple offenses entailing multiple punishments will not be found in equivocal expressions of Congressional intent or in the silence of Congress. The principle that a criminal statute will be strictly construed does not stem from sentimental solicitude for transgressors but is derived from the concern of the common law that no man be unjustly accused or punished.

It is upon these basic doctrines that we rest the petitioner's case. They were not applied by the Court of Appeals. That Court misread the statute with respect to the offense that was condemned. Under its view of the statute it followed its own Mann Act decisions upholding multiple offenses in its original opinion. Subsequently learning of the decision of this Court in the *Bell* case, it rejected its authority by a *tour de force* and ignored its implications.

Excessive punishments imposed on the basis of supposed multiple offenses present a grave problem in the administration of the criminal law. The magnitude of the injustices that may be inflicted upon admittedly guilty men is indicated by a glance at a few cases where multiple punishments were rejected.[11]

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[11] See, for example, *Prince* v. *United States, supra,* sentence of 35 years held excessive by 15 years; *Johnston* v. *Lagomarsino,*

Important reforms in respect of multiple offenses, trials and punishments are recommended in the pending proposed Model Penal Code of the American Law Institute. Under that Code, where the same conduct may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense but may not be convicted of more than one offense if one offense consists only of a conspiracy or other form of preparation to commit the other. Section 1.08(1), American Law Institute Model Penal Code, Tentative Draft No. 5. In the present case, the first count of the indictment charged the defendants with conspiracy to commit the offenses alleged in the second and third counts (R. 1). Since the sentences imposed on the first and second counts were concurrent, the multiplication of convictions by virtue of the conspiracy count is not material.

The Model Penal Code does not deal with the problem whether one or more offenses are committed where a single criminal act has multiple consequences, as in the present case, since the problem relates to substantive law and is not within its purview. *Op. cit. supra,* Tentative Draft No. 5, page 38. However, the sentence in this case would be excessive under a provision in the Code that, when separate sentences of imprisonment are imposed for two or more crimes, such sentences shall run concurrently if any of the sentences is for a felony. *Op. cit. supra,* Tentative Draft No. 2, Sec. 7.06. This section and other provisions, which relate to the companion cases to be argued herewith,

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supra, sentence of 20 years reduced to 10 years; *Colson* v. *Johnston,* 35 F. Supp. 317 (N. D. Cal. S. D., 1940), 11 count indictment held to state a single offense of mail robbery, and sentence of 50 years reduced to 25 years; *Hewitt* v. *United States, supra,* sentence of 45 years reduced to 25 years; *Durrett* v. *United States, supra,* sentence of 60 years reduced to 40 years, and under *Prince* v. *United States, supra,* was still excessive by 20 years; *Dimenza* v. *Johnston, supra,* sentence of 22 years reduced to 7 years; and *Kerr* v. *Squier, supra,* sentence of 27 years held excessive by 10 years.

show that the policy of the Code is strongly opposed to multiple trials and multiple punishments in many situations where they are now tolerated.

In cases involving problems of multiple offenses, trials and punishments, this Court and the lower Federal courts have recognized that the true inquiry is the intention of Congress but have, nevertheless, frequently applied the "same evidence" rule in determining whether one or more offenses have been committed. See *Blockburger* v. *United States,* 284 U. S. 299 (1932); *Morgan* v. *Devine, supra,* 237 U. S. 632 (1915); *Burton* v. *United States,* 202 U. S. 344 (1906); *Warner* v. *United States, supra,* 168 F. (2d) 765 (C. A. 5th, 1948). That rule is stated in *Gavieres* v. *United States,* 220 U. S. 338, 342 (1911), quoting the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth,* 108 Mass. 433, 434 (1871):

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

One court of appeals has perceived the danger of dissecting a single criminal act or transaction into multiple offenses under the same evidence rule and has held that the rule must be applied "with some discrimination." *Robinson* v. *United States, supra,* 143 F. (2d) at 277. Yet, the test was used by the Court of Appeals in this case, as it has been used by other courts, as a rule of thumb substituting inadequately for a full inquiry into the legislative intent (R. 21). See *Gore* v. *United States,* —— F. (2d) ——, decided April 25, 1957 (C. A. D. C.); *Warner* v. *United States, supra,* 168 F. (2d) 765 (C. A. 5th, 1948); *United States* v. *Cameron, supra,* 84 F. Supp. 289 (S. D. Miss.

S. D., 1949); *State* v. *Fredlund, supra,* 200 Minn. 44 (1937).

The decision in *Bell* v. *United States, supra,* is inconsistent with the "same evidence" rule. Under that rule the transportation of each woman would have been an independent fact supporting a separate offense and punishment. And some circuit judges have found in the *Universal C. I. T.* case, the *Bell* case, and the *Prince* case, all *supra,* reason to believe that this Court has abandoned the rule. *Gore* v. *United States, supra* (concurring opinion of Judges Bazelon and Fahy). Since the same evidence rule "has facilitated the fragmentation of crimes into multiple, separately punishable components," (*ibid.*), it is submitted that the rule should now be repudiated. Such a repudiation would bring a greatly needed reform to the administration of criminal justice. And in place of that rule there should be applied in this case the principle reaffirmed by this Court in *Prince* v. *United States, supra,* 352 U. S. at 329, "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."

Conclusion

For the foregoing reasons we respectfully urge that the judgment of the Court of Appeals should be reversed and that the cause be remanded with instructions to grant petitioner a hearing on his motion to correct his sentence.

Respectfully submitted,

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(Appointed by this Court)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 2

LOVANDEE LADNER,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Introductory Statement

This case is before the Court for reargument. The case was first argued on November 19, 1957. Thereafter, on January 6, 1958, the judgment of the Court of Appeals was affirmed by an equally divided Court. 355 U.S. 282. A petition for rehearing was duly filed by petitioner; and on May 26, 1958 the Court granted said petition, vacated its judgment of January 6, 1958, and restored the case to the calendar for reargument. 356 U.S. 969.

This supplemental brief is filed solely for the purpose of considering the relevant decisions of the Court that have been rendered since the original argument. Rule 41 (5).

It is respectfully requested that strict compliance with the rules in respect of the contents of this brief not be required, since the omitted items are set forth in petitioner's original brief.

ARGUMENT

In our main brief we have shown that Section 254 of former Title 18, U.S. Code, should be construed by its own terms not to permit multiple punishments for the multiple consequences of a single act in violation of the statute. Accordingly, we have argued, there is no need to seek extraneous aid to ascertain the intention of Congress in enacting Section 254, either in the legislative history of that statute or in decisions involving other statutes.[1] Nevertheless, we have shown that both the legislative history of Section 254 and the doctrine of *Bell* v. *United States,* 349 U.S. 81, and related cases support the construction of Section 254 derived from its own terms.[2] Decisions of this Court since the original argument herein are relevant to the latter contention.

I.

The Doctrine of Bell v. United States Has Been Reaffirmed by This Court in Gore v. United States

In *Bell* v. *United States, supra,* this Court held that a single act of transportation in violation of the Mann Act constitutes only one offense even though more than one woman is transported. Conceding the power of Congress to punish the multiple consequences of a single criminal transaction as separate offenses, this Court held that such

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[1] Petitioner's main brief, pp. 10-13.

[2] Petitioner's main brief, pp. 13 *et seq.*

an intention would not be imputed to Congress in the absence of evidence of such an intention in the enactment of the particular statute. Expressions to the same effect are found in *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, and *Prince* v. *United States*, 352 U.S. 322.

In its recent decision in *Gore* v. *United States*, 357 U.S. 386, the Court reaffirms the doctrine of the *Bell* case but refuses to apply that doctrine to a single criminal transaction in violation of the narcotics laws. Each of the two transactions in that case was in violation of three separate statutes respectively prohibiting the sale of narcotic drugs "except in the original stamped package or from the original stamped package" [26 U.S.C. § 4704 (a)], the sale of such drugs "except in pursuance of a written order of the person to whom such article is sold" [26 U.S.C. § 4705 (a)], and facilitating "the transportation, concealment, or sale of any such narcotic drug after being imported" contrary to law [21 U.S.C. § 174]. Since the three statutes had been enacted at different times and dealt with separate aspects of illicit traffic in narcotic drugs, and since the entire history of legislation to curb such traffic discloses the continuing intention of Congress to inflict increasingly severe punishment for offenses against such legislation, the Court held that the conditions requisite for the application of the *Bell* doctrine were not present.

Thus the *Gore* case has clarified, and limited the reach of, the doctrine of the *Bell* case. That doctrine applies only where a single criminal act or transaction violates a single statutory provision and there are multiple consequences, or more than one victim, of the act or transaction. In such a case, if Congress has not clearly indicated an intention to inflict multiple punishments for such multiple consequences, "the doubt will be judicially resolved in favor of lenity." *Gore* v. *United States*, 357 U.S. at p. 391.

The requisite conditions for application of the *Bell* doctrine are clearly present in the instant case. Only a single statutory provision, Section 254 of former Title 18, is involved. Petitioner engaged in only a single criminal transaction, indeed committed only a single criminal act, in firing a shotgun only once.[3] Nor is there a history of persistent efforts of Congress to inflict increasingly severe penalties in order to stamp out the evil condemned by Section 254 and related statutes, such as we find in the narcotic drugs legislation.

In the *Gore* case the Court reached its decision that multiple offenses were committed by making a full inquiry into the intention of Congress. The "same evidence" rule was not mentioned, although that rule had been invoked to support the decision in *Blockburger* v. *United States,* 284 U.S. 299, the forerunner of the *Gore* case.[4] It seems that, in determining the number of offenses under a Federal statute, this Court will not apply this mechanical rule of construction, which is clearly inconsistent with the decision and rationale of the *Bell* case and of the *Prince* case.[5]

II.

Other Recent Decisions of This Court May Be Distinguished From the Present Case

The issues in *Hoag* v. *New Jersey,* 356 U.S. 464, and *Ciucci* v. *Illinois,* 356 U.S. 571, were quite different from the issue in the present case. In each of those cases a state court had held that a separate offense against the laws of the state had been committed in respect of each victim of

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[3] See petitioner's main brief, p. 7, footnote 2.

[4] See petitioner's main brief, p. 30.

[5] See petitioner's main brief, p. 31.

a single criminal transaction, and this Court held that there was no violation of the due process clause of the Fourteenth Amendment in successive prosecutions by the state for such offenses.

In the *Hoag* case this Court stated explicitly that the New Jersey courts had construed the New Jersey statute "as making each of the four robberies, though taking place on the same occasion, a separate offense," that this construction was consistent with the "same evidence" rule as applied in New Jersey, and that "nothing in the Due Process Clause prevented the State from making that construction." 356 U.S. at page 467. But in the present case the interpretation of a Federal statute by Federal courts is involved, there is no constitutional question, and the issue of statutory construction is for this Court. Inasmuch as solution of that issue depends on the determination of the intention of Congress from Section 254 itself, its legislative history and other proper sources, the *Hoag* and *Ciucci* cases are not in point.

Conclusion

For the reasons stated in our main brief and in this supplemental brief, we respectfully urge that the judgment of the Court of Appeals be reversed and that the cause be remanded with instructions to grant petitioner a hearing on his motion to correct his sentence.

Respectfully submitted,

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No. 52

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOVANDER LADNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 41

LOVANDER LADNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals, as amended on April 4, 1956, is reported at 230 F. 2d 726. The opinion of the District Court appears at pp. 13–14 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1956. On May 10, 1956, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to June 28, 1956. The petition was filed on June 21, 1956, and was granted November 13, 1956. 352 U. S. 907. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether separate counts of an indictment charging assaults on the same day upon two different federal officers on account of the performance of his duties, stated separate offenses, so as to support consecutive sentences.

STATUTE INVOLVED

18 U. S. C. (1946 ed.) 254, presently 18 U. S. C. 111, provided:

> Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in section 253 of this title while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

STATEMENT

In June, 1944, in the United States District Court for the Southern District of Mississippi, petitioner and another were convicted on a three count indictment charging conspiracy to assault federal officers on account of the performance of their duties and two substantive offenses of assault, each naming a separate federal officer (R. 1–5, 10). The second count alleged that petitioner and his co-defendant, by means of loaded shotguns, assaulted and wounded Reed, an agent of the Alcohol Tax Unit "on account of the

performance of his official duties", while Reed was then, to the defendants' knowledge, engaged in the performance of his official duties acting jointly with W. W. Frost, another agent, both of whom had various persons under arrest and were transporting them to jail. The third count was in the same language as the second except that Frost was named as the officer assaulted and wounded and Reed as his companion (R. 3–5). Petitioner was sentenced to ten years on each of the substantive counts, the sentences to run consecutively (R. 10–11).[1]

In January, 1955, petitioner moved to correct the sentence on the ground that the two substantive counts charged only one offense (R. 11–12). In a supporting brief, he alleged that evidence at the trial "showed that the two officers were together on the front seat of an automobile" and he "fired a shotgun into the vehicle" (see R. 18). The District Court denied the motion without a hearing (R. 14–15). In his opinion, the district judge stated that, despite the absence of a transcript,[2] his personal recollection was that the evidence in the case showed that more than one shot had been fired. His holding was that an assault upon each officer was a separate crime (R. 13–14). See also *United States* v. *Cameron*, 84 F. Supp. 289 (S. D. Miss.), where the District Court

[1] A sentence of two years was imposed on the first count to run concurrently with the sentence imposed on the second count.

[2] The trial took place in 1944, prior to the enactment, in 1948, of 28 U. S. C. 753, which provides for the recording of all proceedings in criminal cases.

had made a similar ruling as to petitioner's co-defendant.

On appeal, the Court of Appeals affirmed the judgment of the District Court (R. 22). In its opinion (R. 17–22), the Court of Appeals stated that, if it were significant whether one or more shots were fired, petitioner should have had a hearing to determine the facts. It ruled that, in this case, no hearing was necessary since petitioner "was guilty of a separate assault upon each of the two officers who were wounded by his gun fire," and that this was so whether one or more shots were fired.

SUMMARY OF ARGUMENT

The courts below, for the purpose of decision, assumed that the evidence adduced at petitioner's trial showed that one shot injured two officers, each engaged in the performance of his official duties. They properly held that, even on this assumption, consecutive sentences could properly be imposed for assaults upon each officer.

An assault, not a wounding, is the crime for which petitioner was convicted. The statute provides for the punishment of one who assaults a federal officer "on account of the performance of his official duties." The unit protected (a federal officer), the basis of federal jurisdiction (performance of duties as an officer), and the intent of the defendant (assault on account of the performance of duty) are all necessarily personal and individual as to each officer involved. For this reason, both as a matter of statutory construction and of double jeopardy, the assault on

each officer "on account of the performance of his official duties" is a separate offense. The number of shots fired in assaulting each officer is therefore immaterial.

I

The words of the statute are in the singular. The legislative history shows that Congress wished to protect each federal officer, not only to promote the orderly functioning of the federal government but also to protect the individual officer as a "ward" of the government. Since the basis of federal jurisdiction is interference with a federal officer in the performance of his duty, the crime is in its nature individual as to each officer who is prevented from doing his duty. And most important, the elements of the offense are separate as to each officer. Assault is an offense against each person. And in addition, under this statute, the reason for the assault must be personal, *i. e.*, each officer must be assaulted "on account of the performance of his official duties." Thus, by every criterion by which legislative intent can be judged, an assault upon each officer is a separate offense.

II

Recognizing that under the decisions of this Court one act may constitute two crimes without violating the constitutional provision against double jeopardy, petitioner makes no claim that each assault could not constitutionally be separately punished. It is significant, however, that, where this question has arisen in terms of double jeopardy, even in the context of a new

trial after a prior acquittal or conviction, this Court and the overwhelming majority of the states (perhaps all of the states) hold that there is a separate offense as to each person injured, at least in the situation where there is intent to injure each victim. Since, here, the statute requires intent not only to assault each officer, but to do so for a reason which must be specific and personal as to each officer, multiple punishment for the two assaults would violate no constitutional rights.

III

Since the number of shots is, in our view, not significant to the issue of the validity of consecutive sentences for each assault, there is no occasion for a hearing in the District Court. Under the indictment in this case, the jury had to find intent, as to each officer, that the assault was "on account of the performance of his official duties".

Assuming that the number of shots would be material, there is a serious question as to whether the issue can be determined now by collateral attack. Petitioner's allegation that only one shot was fired is not admitted by the government. It is possible that there was conflicting evidence as to this fact at the trial. A judge at a hearing now could thus be called upon, not only to determine what the evidence was at the trial, but to resolve a conflict which could and should have been resolved by a trial jury. To permit such an issue to be raised on collateral attack would extend the remedy far beyond its present limits.

ARGUMENT

The courts below have decided this case as on a motion to dismiss for failure to state a cause of action. They have, for the purposes of decision, accepted as true the dubious version of events suggested by petitioner—that in an affray by two persons (petitioner and his co-defendant) with loaded shotguns, there was only one shot fired which wounded two officers riding in a moving vehicle. The courts have held that, even on this assumption, petitioner was properly convicted of two offenses since, under 18 U. S. C. 254, each assault upon each officer, on account of the performance of his official duties, must necessarily be a separate offense. We discuss the case primarily on that basis because it seems to us that, under this statute and this indictment, each charge with respect to the two officers had to be separate as to the elements of the offense and the proof, and that this is so regardless of the number of shots fired. Indeed, since assaults and not woundings are the crimes for which petitioner and his co-defendant were convicted, the firing of any shots is immaterial. An assault on each of the officers was committed when the loaded shotguns were aimed at both officers and before any shot was fired.

The government's position is basically this: under former 18 U. S. C. 254 (present 18 U. S. C. 111), the unit protected (a federal officer), the basis of federal jurisdiction (performance of duties as an officer), and the intent of the defendant (assault on account of the performance of duty) all are necessarily personal to each officer involved. For this reason, the statute

should be interpreted as imposing a separate penalty for assault upon each officer. Under all the relevant principles and decisions of this Court, and even under theories more restrictive of the prosecution followed in some states, which this Court has never adopted, separate offenses result from injuries to more than one person from one act if the interest protected, the harm done, and the intent of the defendant all are personal and individual as to each of the victims.

I

AS A MATTER OF STATUTORY CONSTRUCTION, ASSAULT UPON EACH FEDERAL OFFICER ON ACCOUNT OF THE PERFORMANCE OF HIS DUTY IS A SEPARATE OFFENSE

In conceding, as he does, that Congress could have imposed double punishment for the double impact of a single blow on two federal officers (Pet. Br. 22), petitioner disclaims any reliance upon the constitutional protection against double jeopardy as a basis for his contention that the two counts involved in this case state only one offense. While we undertake to discuss the double jeopardy question, *infra* pp. 19–24, it is well to note at the outset that this case is basically different from the two state cases preceding it in this Court (*Barktus* v. *Illinois*, No. 39, this Term, and *Hoag* v. *New Jersey*, No. 40, this Term), which raise issues of double jeopardy with overtones of *res judicata*. Even if the constitutional provision can be said to be involved here, it does not arise in the context of one jury finding guilt contrary to the finding of innocence by another jury. In contrast to the preceding state cases, there was here one trial by one jury which returned

a completely consistent verdict to the effect that the defendants assaulted with dangerous weapons each of two federal officers on account of the performance by each of his duty as a federal officer. The question is merely whether Congress has made that one offense or two.

A. THE PURPOSE OF THE STATUTE, THE BASIS OF JURISDICTION, AND THE NATURE OF THE OFFENSE ALL POINT TO EACH INDIVIDUAL OFFICER AS THE UNIT OF THE CRIME.

1. Petitioner was indicted under that portion of former 18 U. S. C. 254 which punished one who assaults a federal officer "on account of the performance of his official duties", the statute then providing for an increased penalty if "in the commission of any of the acts described in this section" a deadly weapon was used. Manifestly, the use of the dangerous weapon is not, as petitioner claims (Pet. Br. 10–21), the gravamen of the offense. It is not a separate offense at all. Like the provision for aggravated punishment for putting life in jeopardy under the bank robbery statute (see *Holiday* v. *Johnston,* 313 U. S. 342, and cases cited Pet. Br. 25), the portion of this statute relating to use of a dangerous weapon merely authorizes increased punishment. If this were less clear than it is from the words of the statute, the legislative history makes this explicit. The Act of May 18, 1934 (48 Stat. 780, 781), enacting former 18 U. S. C. 253 and 254, was entitled "An Act to Provide Punishment for Killing or Assaulting Federal Officers". The House Report (H. Rep. No. 1455, 73rd Cong., 2d Sess.) states of Section 2 (18 U. S. C. 254) that "[i]f a dangerous

weapon is used in the commission of any such offense the penalty is increased".

The elements of the offense are, therefore, not the use of a dangerous weapon but (1) assault upon a federal officer, (2) on account of the performance of his official duties. Each of these elements makes the individual officer the basic unit of the crime.

(*a*). Assault is a crime against a person. The definitions of assault given by Bouvier (in his law dictionary) are those commonly accepted:

> An unlawful offer or attempt with force or violence to do a corporeal hurt to another.
>
> Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril.

These elements make each individual assaulted a separate unit of crime. The threat of violence may be by one act addressed to several persons, but its purpose must be to put each individual in fear. And certainly the apprehension of peril aroused by the act is personal and separate as to each individual threatened.

Petitioner agrees, and indeed emphasizes the fact that an assault, and not a wounding, is the offense named in the relevant portion of the statute (Pet. Br. 11–13, 16–17, 20). Thus, in tracing the legislative history of Section 254, petitioner notes (Pet. Br. 16–17) that, "In particular, Congress refrained from taking cognizance of the effects of the acts proscribed in the statute, including the wounding of Federal officers." Presumably, petitioner concedes that if the statute read "or shall assault [or wound] him on ac-

count of the performance of his official duties", with the bracketed words inserted, his entire argument would fail and two crimes would be committed where a single discharge of a weapon wounds two officers. But surely Congress has as much right to protect federal officers from assaults as from batteries—as it has done in this statute—and it is inaccurate to state that Section 254 is "silent concerning the consequences of the forbidden act" (Pet. Br. 13). Although there need not be a physical impact—and, indeed an assault is committed even though the gun is never discharged—there must be an overt act by the defendant in such circumstances as to "cause a well-founded apprehension of immediate peril" to a person.

Petitioner nowhere suggests why an assault is any less personal, in the context of this statute, than the infliction of a wound. An assault, like a battery, is an intentional wrong directed against the person. And, since a single act may wound as many as it may assault, or vice versa, there is no intrinsic difference betwen the two in terms of possible multiplicity of crimes.[3] Here, petitioner's assault constituted two separate crimes even before the shotgun pellets wounded the two federal officers.[4]

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[3] To commit an assault there must be at least an apparent ability to commit the battery attempted. *Miller on Criminal Law* (1934), p. 307. One could not therefore be guilty of assaulting a multitude of persons unless he had the apparent ability to commit a battery on the multitude.

[4] If, in a hypothetical case, a defendant, holding two federal officers hostage and intending to kill both, forced them to stand in such a position that a single bullet which he fired passed

(*b*). Even more separate and individual is the second element of the offense, that the assault must be "on account of the performance of his official duties". Under this section an assault upon a federal officer, even with knowledge that he is a federal officer, would not be sufficient; the assault must be committed because the officer is performing his official duties. Hence it is possible for a person to shoot two persons with one shot, or two shots fired consecutively, and still be guilty of an offense under this statute as to one person but not as to the other. (That result could obtain, for example, if the defendant shot at one officer because of a personal grudge knowing that the officer was not acting in his official capacity in accompanying an officer who was so acting). We need not speculate on the factual possibilities. The point is that as to any conviction under this statute, as to each officer, a jury would have to find that the particular officer was assaulted because he was then and there performing his official duty. The purpose as to each officer must be separate and individual, not only in relation to the assault, but in relation to the reason for the assault.

2. In addition to the fact that each element of the offense is separate and individual, the basis for federal jurisdiction in this statute is separate and individual. The basis of federal jurisdiction is interfer-

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through both bodies and killed both officers, few would contend that two murders had not been committed. See *infra* p. 18. Clearly, the act of raising and aiming the weapon constituted an assault against each of the officers and did, no less than the discharge of the gun, constitute two separate crimes.

ence with a federal officer in the performance of his duties. To the extent that each officer is prevented from doing his duty, there is an obstruction of federal power and an impairment of federal efficiency.

This case is thus materially different from *Bell* v. *United States*, 349 U. S. 81, on which petitioner relies, in which this Court held that, as a matter of statutory construction, a single transportation of two women in interstate commerce for immoral purposes constituted only one offense. There, although there had to be a purpose as to each woman, the basis of federal jurisdiction (and an essential element of the crime) was the transportation, which was single. Here, not only is the purpose and effect as to each officer assaulted separate, but the basis of federal jurisdiction is also separate since the basis for invoking federal power is the presence of each individual federal officer.

3. Moreover, both the words of the statute and the legislative history show that Congress intended to protect each officer individually. The statute consistently uses words of singularity, *e. g.*, "Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with *any* person designated in section 1 hereof while engaged in the performance of *his* official duties, or shall assault *him* on account of the performance of *his* official duties" (emphasis added).

The legislative history makes even clearer the purpose to protect each and every federal officer in the performance of his official duties. S. Rep. No. 535, 73d Cong., 2d Sess., states, "The purpose and need

of this legislation are set out in the following letter from the Attorney General to the chairman of this committee." In his letter the Attorney General said:

> The need for general legislation * * * for the protection of Federal officers and employees * * * becomes increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States * * * for the protection of its investigative and law-enforcement personnel * * *. This Department has found need for * * * legislation for the adequate protection of the special agents of its division of investigation, several of whom have been assaulted in the course of a year, while in the performance of their official duties.
>
> In these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government. * * *

See also H. Rep. 1455, 73d Cong., 2d Sess., and 78 Cong. Rec. 8126–8127, where the House debate reflected the purpose of bringing certain federal officers under federal protection. The legislation was aimed at protecting federal officers, not only to promote the orderly functioning of the federal government (whose efficiency would diminish in proportion to the number of individual officers affected), but also to protect the individual officers, as "wards" of the federal government, from personal harm. Both of these legislative objectives make the individual officers a separate unit of protection.

B. SINCE THE INTEREST PROTECTED, THE NATURE OF THE HARM, AND THE INTENT OF THE DEFENDANT ALL RELATE TO THE INDIVIDUAL OFFICER AS A SEPARATE UNIT, THE COURTS BELOW PROPERLY HELD THAT AN ASSAULT UPON EACH OFFICER ON ACCOUNT OF THE PERFORMANCE OF HIS DUTIES IS A SEPARATE CRIME.

In *Bell* v. *United States*, 349 U. S. 81, this Court warned that "* * * it will not promote guiding analysis to indulge in what might be called the color-matching of prior decisions concerned with 'the unit of prosecution' in order to determine how near to, or how far from, the problem under this statute the answers are that have been given under other statutes". See also *Prince* v. *United States*, 352 U. S. 322. We therefore do not elaborate the fairly obvious argument that if, as this Court held in *Ebeling* v. *Morgan*, 237 U. S. 625, the cutting of six mail bags at one time constitutes six offenses on the theory that Congress intended to protect each mail bag, assaulting two officers at one time constitutes two offenses since Congress clearly intended to protect each officer. What we do emphasize is that, as developed in the preceding pages, as to this particular crime, every element by which statutory intent can be judged, and indeed, every reason of policy—the protection of the person, the protection of federal efficiency, the basis of federal jurisdiction, the nature of the offense, and the individualized intent of the defendant—all support the conclusion that, in this statute, Congress intended to and did make each individual officer the unit of the crime. Assault, therefore, upon each officer on account of the performance of his official duties is a separate offense, whether the

assault was perpetrated by one act or a series of acts. Without indulging in "color matching", we think it is fair to point out that petitioner has not cited, and we think cannot cite, any case which has held that injury to two persons constitutes only one offense where the basic crime is injury to the person and there must be a separate intent to assault each individual on account of his performance of duty.

The case which comes closest to supporting petitioner is *Bell* v. *United States*, 349 U. S. 81, where this Court held that one transportation of two women for the purposes of the Mann Act was one offense. But, as we have already pointed out (*supra*, p. 13), the *Bell* case is distinguishable in that there the basis of federal jurisdiction was the transportation, which was single. In *United States* v. *Universal C. I. T. Corp.*, 344 U. S. 218, where this Court held that the offense punishable under the Fair Labor Standard Act was a course of conduct, there was specific legislative history in support of that conclusion. Moreover, the Court in that decision treated as one offense "all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse' ". 344 U. S. at p. 224. Here, as we have pointed out, the statute in punishing an assault "on account of the performance of his official duties" necessarily requires that there be two separate elements of intent—the purpose to create fear and the purpose to prevent official action—separately proved as to each individual officer. There can be no single impulse even if there is a single discharge of a gun.

As to the decisions of lower courts, cited by petitioner (Pet. Br. 25),[5] which have held under the bank robbery statute that there can be only one punishment for the aggravation of the offense by putting life in jeopardy no matter how many persons are threatened, they are (regardless of their validity) of no aid in the solution of the present problem. In those cases the basic offense is taking the property of the bank; the unit protected is the bank, and the jeopardizing of life is not a separate crime but is merely a basis for increasing the penalty. *Holiday* v. *Johnston,* 313 U. S. 342. Here, the basic crime is the offense against the person, and the unit protected is the person. Each person is therefore properly treated as the unit of the crime.

We discuss, *infra* pp. 19–24, the problem of multiple injuries arising from one act as an issue of double jeopardy. It is in that context that most of the state decisions have arisen. But, on the issue of statutory construction, it is significant that, as we develop below, injury to the person has been considered such a serious matter that, even in the context of double jeopardy in relation to second trials, the majority of states hold that the injury of each individual is a separate crime even though there was only one act and one intent. It is even more significant that we have found no state which clearly holds that one discharge of a gun constitutes one offense of assault or murder where there is an attack against two persons,

[5] *Lockhart* v. *United States*, 136 F. 2d 122 (C. A. 6); *Dimenza* v. *Johnston*, 130 F. 2d 465 (C. A. 9).

with intent to injure each.* As shown *infra*, the overwhelming majority of the states hold that there is a separate offense as to each person injured, at least in the situation where there is intent to injure each victim. As was said in *State* v. *Robinson*, 12 Wash. 491, 495, 41 Pac. 884:

> The taking of a human life with certain intent constitutes murder, and neither law nor public policy will justify a holding that each life is of less value when taken with another than it would be if taken alone. If a person without justification intends to kill A and does so, he will be guilty of a crime; if he intends to kill B, he will be guilty of another and a different crime; and the fact that he entertains the intent to kill both and carries such intent into effect at the same time and place, should not be held to make of that which would otherwise be a foundation for two distinct prosecutions a foundation for only one.

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*The decision generally cited for this proposition is *State* v. *Damon*, 2 Tyler (Vt.) 387, 390, where the court said: "The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows he has been legally convicted by a Court of competent jurisdiction. He cannot therefore be again held to answer in this Court for the same offence."

On the theory that both indictments were for the *same breach of peace* and not for wounding two persons by the same wrongful act, this case may be harmonized with what we think is the rule in all the other states. See *People* v. *Majors*, 65 Cal. 138, 3 P. 597.

II

THE CONSTITUTIONAL PROVISION AGAINST DOUBLE JEOPARDY DOES NOT BAR THE PUNISHMENT OF SEPARATE INJURIES TO SEPARATE INDIVIDUALS AS SEPARATE OFFENSES, PARTICULARLY WHERE THERE MUST BE A SEPARATE INTENT AS TO EACH INDIVIDUAL

The disclaimer by petitioner's attorney of any reliance on principles of double jeopardy finds ample support in the decisions of this Court. The Court has held, in different contexts, that one act may result in multiple crimes. See, *e. g.*, *Pereira* v. *United States*, 347 U. S. 1, 9. It has held that an initial step like possession does not necessarily merge in the completed act of sale of which the initial step is a part (*Albrecht* v. *United States*, 273 U. S. 1); that one act of sale may violate different parts of one statute (*Blockburger* v. *United States*, 284 U. S. 299); that one insult may be two different crimes (*Gavieres* v. *United States*, 220 U. S. 338). Specifically as to two assaults at the same time (although not apparently by one act) this Court held in *Flemister* v. *United States*, 207 U. S. 372, 375, that there was nothing in the Philippine bill of rights[1] "that forbids assaults on two individuals being treated as two offenses, even if they occur very near each other in one continuing attempt to defy the law." The rule laid down by this Court is that, if the facts necessary to establish the first indictment (not the

[1] In *Trono v. United States*, 199 U. S. 521, the Court had treated the guaranty against double jeopardy in the Philippine bill of rights as the same as that guaranteed by the Fifth Amendment.

actual facts proved but those necessary to make out an offense) would not prove the second offense, the offenses are distinct. *Pinkerton* v. *United States,* 328 U. S. 640, 643–644; *Blockburger* v. *United States,* 284 U. S. 299, 304; *Gavieres* v. *United States,* 220 U. S. 338, 342; *Carter* v. *McClaughry,* 183 U. S. 365. In this case, proof that petitioner was shooting at one officer "on account of the performance of his official duty" would not necessarily prove either that petitioner intended to shoot the other officer, or that he did so because the other officer was performing his official duty. There was thus no double jeopardy.

For the purposes of double jeopardy this Court has not differentiated between multiple sentences and retrial after a prior acquittal or conviction on one offense. It has dealt with the problem of retrial in terms of *res judicata,* rather than double jeopardy. See *Sealfon* v. *United States,* 332 U. S. 575; *Adams* v. *United States,* 281 U. S. 202. Much of the confusion and conflict which has been noted in state cases in this field arises, we think, from different views as to the extent that *res judicata* principles should be incorporated in the concept of double jeopardy. As noted, in contrast to the *Hoag* and *Barktus* cases (which the Court is also hearing), no such problem is presented here. It is significant, however, both in statutory and constitutional terms, that, even in the context of the weight to be given to a former conviction or acquittal, there is almost complete agreement that injuries to two persons are separate crimes if there must be a separate intent as to each.

In situations where there has been a series of acts at the same time and place in the same affray, resulting in either similar or dissimilar injuries to several persons, there is almost complete unanimity of result in finding, as this Court held in *Flemister* v. *United States*, 207 U. S. 372, that the injury to each person may be a distinct offense.[8] The decisions reaching a contrary result do so on the basis of the absence of intent to injure more than one person. *Hurst* v. *State*, 24 Ala. App. 47; *Spannell* v. *State*, 83 Tex. Cr. Rep. 418; and *State* v. *Houchins*, 102 W. Va. 169. All three of these cases turn upon a question of intent; in each the defendant unintentionally killed an innocent bystander along with an alleged assailant as he, in self-defense, and with a single volition, shot at the assailant. In holding that a former acquittal for the death of one of the victims was a bar to prosecution for the death of the other, the decisions

[8] *Kilpatrick* v. *State*, 257 Ala. 316; *Blevins* v. *State*, 20 Ala. App. 229; *Gunter* v. *State*, 111 Ala. 23; *Bell* v. *State*, 120 Ark. 530; *People* v. *Alibez*, 49 Cal. 452; *In re Allison*, 13 Colo. 525; *People* v. *Stephens*, 297 Ill. 91; *State* v. *Melia*, 231 Iowa 332; *State* v. *Taylor*, 138 Kan. 407; *Wallace* v. *Commonwealth*, 207 Ky. 122; *Canada* v. *Commonwealth*, 242 Ky. 71; *Ridner* v. *Commonwealth*, 242 Ky. 557; *Combs* v. *Commonwealth*, 259 Ky. 703; *State* v. *Roberts*, 170 La. 727; *Johns* v. *State*, 130 Miss. 803; *Teat* v. *State*, 53 Miss. 439; *State* v. *Nash*, 86 N. C. 650; *State* v. *Billotto*, 104 Ohio St. 13; *Orcutt* v. *State*, 52 Okla. Cr. 217; *Commonwealth* v. *Melissari*, 298 Pa. 63; *Commonwealth* v. *Valotta*, 279 Pa. 84; *State* v. *Corbitt*, 117 S. C. 356; *Duke* v. *State*, 197 Tenn. 346; *Alsup* v. *State*, 120 Tex. Crim. Rep. 310; *Berwick* v. *State*, 120 Tex. Crim. Rep. 322; *Augustine* v. *State*, 41 Tex. Cr. Rep. 59; *Skelton* v. *State*, 110 Tex. Crim. Rep. 621; *State* v. *Robinson*, 12 Wash. 491; *State* v. *Evans*, 33 W. Va. 417. See Note, 40 Yale L. J. 462, 465.

distinguish the situation which involves two volitions. The *Hurst* decision specifically noted that, if there be formed design as to each victim, two offenses result.

Where there is only one act but distinct intents as to each person injured the state cases hold that there are two offenses. *E. g., Berry* v. *State,* 195 Miss. 899, where the court said:

> If, for instance, knowing that a person is alone in a house and so ill as to be unable to move, an accused sets fire to the house in order thereby to burn to death the disabled person, and such is the result, there would be but one act, the setting of the fire, but there would be two offenses, arson and murder, one against the person and the other against the property. If, then, there were two disabled persons in the house, like reason would produce the result that three offenses were committed. To pursue the illustration further: Had one of the inmates succeeded, although severely burned, in crawling from the fire, and thereby survived, it would hardly be contended that the conviction or acquittal of the accused for the attempt upon the life of the survivor would bar a prosecution for the murder of the other. Thus, in point of law, the offenses are distinct, although the product of a single act.

The only holding *contra* that we have found is *State* v. *Damon,* 2 Tyler (Vt.) 387, which, as noted, *supra,* p. 18, fn. 6, may be distinguished on the ground that the offense was breach of peace rather than injury to the person. Indeed, injury to the person has been regarded as so personal and serious a crime that

(while the evidence may in fact show intent as to each individual) the majority of the state opinions indicate that each injury would constitute a separate offense, even where there was only one act and intent to injure only one individual. *People* v. *Brannon,* 70 Cal. App. 225, 233; *People* v. *Majors,* 65 Cal. 138; *People* v. *Vaughn,* 215 Ill. App. 452; *Commonwealth* v. *Browning,* 146 Ky. 770; *Keeton* v. *Commonwealth,* 92 Ky. 522; *State* v. *Nash,* 86 N. C. 650; *State* v. *Corbitt,* 117 S. C. 356; *Vaughan* v. *Commonwealth,* 2 Va. Cas. 273; *Commonwealth* v. *Allen,* 18 Va. Law Reg. 410; *Winn* v. *State,* 82 Wis. 571. These authorities are relied upon, and buttressed by, the many recent decisions which have sustained separate manslaughter prosecutions for each wrongful death resulting from a single reckless act in the operation of an automobile.[9] Significantly, where a contrary view is taken it is on the basis that there is only one intent. *State* v. *Wheelock,* 216 Iowa 1428; *Smith* v. *State,* 159 Tenn. 674. See also *State* v. *Cosgrove,* 103 N. J. 412.

In short, there is almost universal agreement among the states that, at least where two persons are injured pursuant to a design on the part of the defendant to injure each, there are two offenses. This, we think, accords with the general view of moral responsibility. It would be incongruous to hold that, if a person succeeded in killing three persons with one

[9] *McHugh* v. *State,* 160 Fla. 823; *People* v. *Allen,* 368 Ill. 368; 308 U. S. 511; *State* v. *Carte,* 157 Kans. 673; *Fleming* v. *Commonwealth,* 284 Ky. 209; *Commonwealth* v. *Maguire,* 313 Mass. 669; *State* v. *Fredlund,* 200 Minn. 44; *Burton* v. *State,* 79 So. 2d 242 (Miss.); *Jeppesen* v. *State,* 154 Nebr. 765; *State* v. *Martin,* 154 Ohio St. 539; *Fay* v. *State,* 62 Okla. Cr. 350; *Lawrence* v. *Commonwealth,* 181 Va. 582.

shot, he would be less guilty of three murders than if he fired three shots. Whatever may be the situation when two shots are fired against one person, or when one shot fired with intention to injure one person happens inadvertently to hit several persons, it seems to us clear, by every test used in the American courts, that when two persons are injured pursuant to an intent to injure each, there are two offenses, whether the intent is carried out by one discharge, several discharges from one gun, or several independent shots. And, as we have said, *supra,* pp. 10–11, no logical basis exists for distinguishing, for these purposes, assault cases, such as the instant case, from those cases where the actual wounding constitutes the gist of the crime. In both instances all the elements necessary to create separate crimes are present.

III

THERE IS NO OCCASION FOR A HEARING BEFORE THE DISTRICT COURT

If we are correct in our view that the offense against each officer is separate because there had to be a separate intent as to each officer, there is no occasion for a hearing in the District Court. Each of the substantive counts of the indictment alleged, as to each officer, that the defendant assaulted him "on account of the performance of his official duties." Thus, the jury, by its verdict, had to find that the assault was for the statutory reason as to each officer personally. Any attempt to argue that the facts are otherwise would be an attempt to retry issues which necessarily had to be before the trial jury. That can-

not be done on collateral attack. *Sunal* v. *Large,* 332 U. S. 174; *Harlan* v. *McGourin,* 218 U. S. 442; *Arthur* v. *United States,* 230 F. 2d 666, 668 (C. A. 5).

Assuming, however, that it would be necessary to determine whether one shot had been fired in order to know whether consecutive sentences should properly have been imposed, there would be presented an issue (which is hardly disposed of by characterizing it as frivolous (Pet. Br. 2)) as to the extent to which issues of fact relating to the evidence developed at a trial can be a basis of collateral attack on a judgment. This case is not like the situation in *Prince* v. *United States,* 352 U. S. 322, and *Bell* v. *United States,* 349 U. S. 81, where the facts alleged to show the existence of one offense, pleaded in different counts, were not disputed. Here one cannot tell from the face of the indictment whether one shot was fired or more than one, and there is no concession that the implied claim of one shot accords with the evidence at the trial. Indeed, the recollection of the judge and such evidence as is available, in the absence of a transcript, is to the contrary. A judge at a hearing in this proceeding would, therefore, be required first to determine what evidence was adduced at a trial many years before. And assuming that the evidence at the trial showed a conflict on this issue, he would have to resolve a conflict which could and should have been resolved by the jury sitting at the trial. This would extend the scope of collateral attack far beyond its present limits. It is not the function of a motion under 28 U. S. C. 2255 to pro-

vide a belated trial for conflicting issues of fact which should have been raised at the trial.

A motion under Section 2255 is not available merely because the claim is "that the sentence was in excess of the maximum authorized by law" any more than the remedy is automatically available because the claim is "that the sentence was imposed in violation of the Constitution or laws of the United States". Even a claim of denial of a constitutional right, *e. g.*, that evidence was unlawfully obtained, does not furnish a basis of collateral attack when the issue is one which is essentially part of the trial proceeding, and could have been determined in that proceeding. *Adams* v. *United States ex rel. McCann,* 317 U. S 269, 274; *Davis* v. *United States,* 214 F. 2d 594, 596 (C. A. 7); *United States* v. *Walker,* 197 F. 2d 287, 288 (C. A. 2). The remedy under 28 U. S. C. 2255 was designed as a substitute for the writ of habeas corpus (see *United States* v. *Hayman,* 342 U. S. 205). It was not intended to enlarge collateral attack beyond that available on habeas corpus. *Taylor* v. *United States,* 229 F. 2d 826 (C. A. 8), certiorari denied, 351 U. S. 986; *Burns* v. *United States,* 229 F. 2d 87 (C. A. 8), certiorari denied, 351 U. S. 910; *Kreuter* v. *United States,* 201 F. 2d 33, 35 (C. A. 10). Originally, the writ of habeas corpus could be used to attack judgments of conviction only on the ground that the court was without jurisdiction. *Bowen* v. *Johnston,* 306 U. S. 19, 23–24. While the concept of "jurisdiction" has been enlarged so that the writ reaches many aspects which are not strictly speaking jurisdictional, those matters outside the record which have been held

to be grounds for collateral attack—*e. g.*, denial of counsel, knowing use of perjured testimony [10]—are all of a nature which undermine the fairness of the trial. In that sense the recognized grounds for collateral attack are still jurisdictional. As we have noted, the mere fact that error has been committed, even with relation to a claimed constitutional right, does not furnish, in itself, a ground for habeas corpus. This Court held in *Sunal* v. *Large*, 332 U. S. 174, that, where a judge erroneously prevented a defendant from offering at the trial a defense subsequently held available to one in his position, the conviction could not be attacked on habeas corpus since the issue was one which should have been raised on appeal. Similar in rationale—that the court on collateral attack cannot redetermine issues which should properly have been resolved at the trial—are the cases holding that, where an indictment on its face purports to charge a federal offense, it cannot be challenged, after conviction, unless it appears from the face that no offense could possibly have been committed. *Goto* v. *Lane*, 265 U. S. 393; *Johnson* v. *United States*, 239 F. 2d 636 (C. A. 6); *Alm* v. *United States*, 238 F. 2d 604 (C. A. 8); *Smith* v. *United States*, 205 F. 2d 768 (C. A. 10); *Klein* v. *United States*, 204 F. 2d 513 (C. A. 7); *Taylor* v. *United States*, 177 F. 2d 194 (C. A. 4). In short, as to federal convictions, where the trial itself is in accord with constitutional requirements, errors at the trial, even serious ones, have

[10] See *United States* v. *Hayman*, 342 U. S. 205, 212, fn. 12, where various grounds for habeas corpus are summarized.

normally been held not to be a basis for collateral attack.

In this case, the issue as to whether there had to be one shot or two cannot be said (like the necessity of proving intent as to each officer) to have been an issue necessarily encompassed by the verdict, since the allegations of the indictment do not make that an issue. To that extent the case does not come within such rulings as *Harlan* v. *McGourin*, 218 U. S. 442, that the sufficiency of the evidence to support the verdict cannot be questioned on collateral attack. On the other hand, it is clear that the factual issue, if significant, could and should have been raised at the trial. If there was any conflict with respect thereto, it should have been submitted to and determined by the jury at the trial. This record shows that there is, at the very least, a dispute as to what was proved at the trial. It is possible, and indeed probable, that there was conflicting evidence at the trial as to the number of shots. Under these circumstances, the case seems to us to fall within the holding of *Sunal* v. *Large*, 332 U. S. 174, that conviction after a fair trial cannot be assailed because an available defense was not presented.

If the number of shots is the controlling factor, then the issue as to the extent to which, on collateral attack, a judge may determine either what was proved at the trial or resolve issues of conflicting proof at the trial is one which, we submit, should be decided by this Court at this stage. However, we do not think that the issue need be determined in this case since, for all the reasons hitherto discussed in Points I and II, we

think that the two substantive counts of this indictment allege two offenses, whether there was one discharge of a gun or more than one.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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